CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED SEPTEMBER 22, 1906.

(20,367.)

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No. 1240.

United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Transcript of Record.

Error to the Circuit Court of the United States for the District of Montana.

1 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Caption.

Be it remembered that on the twenty-sixth day of June, 1899, the plaintiff herein filed its second amended and supplemental complaint, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, Defendant.

Second Amended and Supplemental Complaint.

Now comes the plaintiff in the above-entitled action, and for
2 a second amended and supplemental complaint, by leave of the Court first had and obtained, complains of the defendant herein, and for cause of action alleges:

I.

That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then territory (now State) of Montana, under the corporate name of St. Louis Mining and Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said de-

fendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and, as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State.

II.

That at the times hereinafter mentioned this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz Lode Mining Claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis Lode Mining Claim, al-
3 though such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis Quartz Lode Mining Claim, which is situated in Ottawa Mining District, in the county of Lewis and Clark, and State of Montana, and more particularly described as follows, to wit:

Beginning, for the description of lots Nos. 54 and 55 A at corner No. 1, a granite stone 16 by 12 by 12 inches marked "1 M. C. 54," a mound of stones alongside, from which the quarter-section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian bears south 74 degrees and 15 minutes east, 353 feet distant.

Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet, intersect line between townships 11 and 12 north of range 6 west, a granite stone 15 by 14 by 12 inches, marked "54 M. C. 55 A," 450 feet to a point from which a shaft bears north 67 degrees, west 285 feet distant, and from said shaft an open cut, 3 by 5 feet, 100 feet long, runs south 54 degrees east; 655 feet to a point from which a shaft bears west 153 feet distant, 1097 feet to corner No. 2, a slate stone 20x12x5 inches, marked "2 M. C. 55 A," a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner No. 3, a slate stone 14 by 10 by 4 inches, marked "3 M. C. 55 A," a mound of stones
4 alongside, from which the southeast location corner bears south 10 degrees east 435 feet distant.

Thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 by 9 by 7 inches, marked "4 M. C. 55 A," a mound of stones alongside, from which the southwest location corner bears south 79 degrees west 182 feet distant.

Thence fourth course, magnetic variation 18 degrees east, north 51 degrees 15 minutes east, 425 feet to corner No. 5, a granite stone

16 by 12 by 6 inches, marked "5 M. C. 55 A," a mound of stones alongside.

Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees 45 minutes east, 529 7-10 feet distant, intersect said township line, a granite stone 18 by 16 by 7 inches, marked "54 A. 54 M. C.," 1069 feet to corner No. 6, a granite stone 18 by 12 by 6 inches, marked "6 M. C. 54 A," from which a fir tree 13 inches in diameter, marked "6 M. C. 54 B. T.," bears north 15 degrees east 24 feet distant, and a pine tree 5 inches in diameter, marked "C. M. C. 54 B. T.," bears south 54 degrees east, 21 5-10 feet distant.

Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east 515 5-10 feet to corner No. 1 of lot No. 40, the Drumlummon Lode Claim, 579 feet to corner No. 1, the place of beginning, said lots Nos. 54 and 55 A extending 1500 feet in length along said St. Louis vein or lode, the granted premises in said lot containing 18 acres and ninety-three hundredths of an acre.

5 Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode Mining Claim, which said fractional portion of said St. Louis Lode Mining Claim is described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis lode claim, between corners two and three thereof, 226 feet to a point on the boundary line of the St. Louis lode, between corners one and two; thence south 20 degrees 28 minutes west along said boundary, between corners one and two, 60 5-10 feet to corner No. 2 of the St. Louis lode; thence south 51 degrees 30 minutes west 403 feet to corner No. 3 of said St. Louis lode; thence north 45 degrees 30 minutes west along the line of boundary of the said St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844 50-100 square feet, together with all mineral contained therein.

III.

6 That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode Mining Claim, situate and being east of the said St. Louis Lode Mining Claim, and including the 30 foot strip or compromise ground aforesaid, and that the discovery, location and recordation of the said St. Louis Lode Mining Claim and the United States patent therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour Lode Mining Claim.

IV.

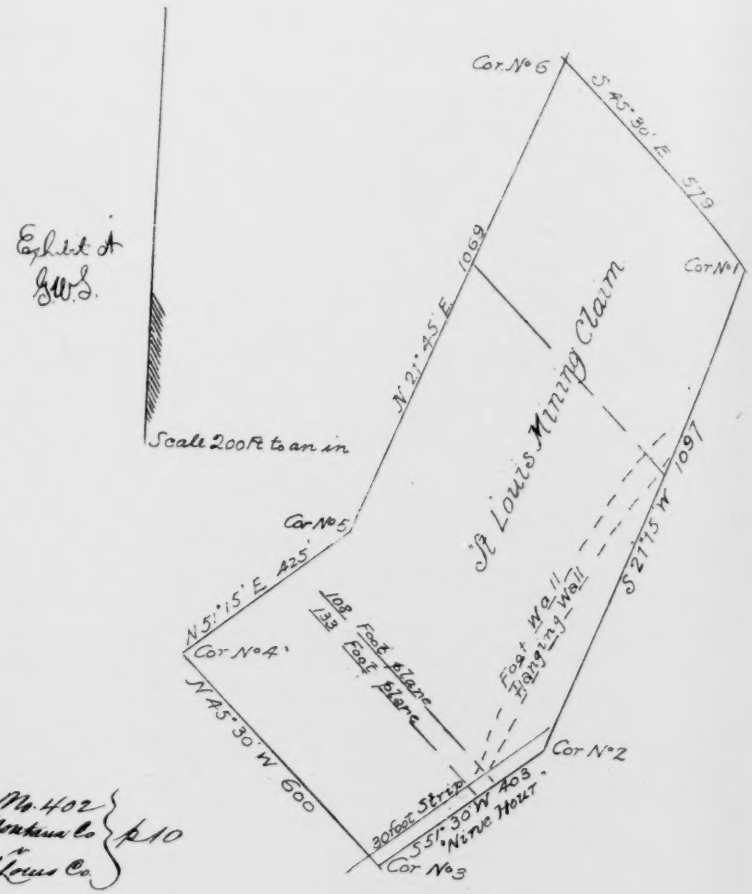
That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis Mining Claim is to the east and dips under and beneath the said Nine Hour Lode Mining Claim, including the said thirty-foot strip or the compromise ground, which is a part and portion of the said Nine Hour Quartz Lode Mining Claim, which said portion of said vein has its top or apex within the said St. Louis Mining Claim as follows, to wit: Commencing at a projected parallel and line of said St. Louis Quartz Lode Mining Claim, at a point on the east line thereof, between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging-wall of said vein, lode, or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz Lode Mining Claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging-wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of said St. Louis Quartz Lode Mining Claim; thence, from where the said projected
7 parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512 7-10 feet to a point, being the intersection of the said east side line of said St. Louis Quartz Lode Mining Claim, between corners Nos. 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 59 degrees 50 minutes west 106 feet and along the west line of the said thirty-foot strip, to a projected parallel end line of said St. Louis Quartz Lode Mining Claim, extended vertically downward, which passes through the hanging-wall of said vein at the surface and at the crossing of the said hanging-wall with the west line of the said thirty-foot strip.

That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot-wall of the said vein passes out of the east side line of the said St. Louis Lode Mining Claim.

A map or plat showing the point at which the said vein enters said St. Louis Lode Mining Claim as so hereinbefore described, and whereat the same departs therefrom upon the east line of said claim is hereto attached, marked Exhibit "A," and made a part of this complaint, and to which reference is made.

V.

That notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the thirtieth day of June,
8 1893, knowingly, wrongfully and unlawfully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis Mining Claim, and commenced extracting quartz, rock and ore therefrom, and removing the same, and converting it to its own use and benefit, and are now still removing and convert-



No. 402
Montana Co
St Louis Co.
} $10

ing the same, which said quartz, rock and ore is of the value of two hundred thousand dollars; on account thereof this plainaiff has been damaged in said sum.

That since the filing of the original complaint herein, and up to the twenty-sixth day of June, 1899, said defendant, Montana Mining Company, Limited, has extracted a large quantity of quartz, rock and ore from the premises and veins above described and within the planes aforesaid, and converted the same and the minerals therein contained to their own use, of the value of four hundred thousand dollars, and to the damage of this plaintiff in said sum.

Wherefore, plaintiff prays judgment for the said sum of six hundred thousand dollars, together with its costs and disbursements in this behalf expended.

TOOLE, BACH & TOOLE,
Attorneys for Plaintiff.

9 UNITED STATES OF AMERICA,
State of Montana, County of Lewis and Clarke, ss:

On this twenty-fourth day of June, A. D. 1899, personally appeared before me, Harry Harris, a notary public in and for the said county and State, William Mayger, general manager and superintendent of the St. Louis Mining and Milling Company of Montana, the plaintiff corporation above named, who being by me duly sworn, deposes and says: That he is the general manager and superintendent of said company and familiar with its business; that he has read the foregoing bill of complaint, and knows the contents thereof; and that the same is true to the best of his knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-fourth day of June, A. D. 1899.

HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, State of Montana.

[Endorsed:] No. 291. (Title of Court and Cause.) Second Amended and Supplemental Complaint. Filed and entered June 26, 1899. Geo. W. Sproule, Clerk.

(Here follows diagram marked p. 10.)

11 The summons in this cause as heretofore issued being in the words and figures as follows, to-wit:

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,

vs.

MONTANA MINING COMPANY (LIMITED), RAWLINSON T. BAYLISS, ALEXANDER BURRELL, NICHOLAS FRANCIS, ISAAC WARREN, JOSEPH HARVEY, JOHN JEWELL, and THOMAS HOWKINS, Defendants.

Action brought in the said Circuit Court, and the complaint filed in the office of the Clerk of said Circuit Court, in the city of Helena, County of Lewis and Clarke.

Summons.

The President of the United States of America to Montana Milling Company (Limited), Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Thomas Howkins, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the
12 United States, Ninth Circuit, in and for the District of Montana, and to file your plea, answer or demurrer to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city of Helena, and county of Lewis & Clarke, within twenty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover a judgment against you, said defendants, for the sum of two hundred thousand — damages, sustained by plaintiff from you, said defendants, for wrongfully, unlawfully and willfully, on or about the thirtieth day of June, 1893, entering upon one of the veins, lodes or ledges bearing gold, silver, lead and other precious metals, and having its top or apex within the surface location of the St. Louis Quartz Lode Mining Claim, the property of said plaintiff; and within the vertical planes thereof, and extracting therefrom and taking large quantities of ore and quartz-rock bearing gold, silver, lead and other precious metals lying within the premises of said plaintiff, and which you have converted to your own use and benefit (for a more particular description of said premises you are hereby referred to the complaint), all of which will more fully appear by reference to the complaint on file herein, a copy of which is herewith served, and for costs of suit. And if you fail to appear and plead, answer or demur, as herein required, your default will be entered, and the plaintiff will apply to the Court for the relief demanded in the complaint.

13 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this eighteenth day of September, one thousand eight hundred and ninety-three, and of our Independence the one hundred and eighteenth.

[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE, *District of Montana:*

I hereby certify that I received the within writ on the nineteenth day of September, 1893, and personally served the same on the twentieth day of September, 1893, on the Montana Company, Limited, a corporation, by delivering to and leaving with Rawlinson T. Bayliss, agent and general manager of the said corporation, on Rawlinson T. Bayliss personally, and Alexander Burrell, Isaac Warren, Jos. Harvey, Nicholas Francis, John Jewell and Thomas Howkins, said defendants named therein, personally, at Marysville, county of Lewis & Clarke, in said District, a certified copy thereof, together with a copy of the complaint, certified to by the clerk of the United States Court.

Helena, Sept. 21, 1893.

WM. F. FURAY,
United States Marshal,
By GEO. A. LECRESSY, *Deputy.*

14 [Endorsed:] No. 291. (Title of Court and Cause.) Summons. Filed Sept. 25, 1893. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the thirtieth day of June, 1899, the answer of defendant was filed herein, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY, Plaintiff,
vs.
MONTANA MINING COMPANY (LIMITED), Defendant.

Answer to Second Amended and Supplemental Complaint.

Comes now the defendant above-named, and for its answer to the second amended and supplemental complaint of plaintiff on file herein, says:

I.

It admits the allegations contained in paragraphs numbered 1, 2 and 3 of the said second amended and supplemental complaint.

II.

It denies each and every other allegation in the said second amended supplemental complaint contained.

15 III.

And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached marked Exhibit "A," and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis Lode Mining Claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said defendant and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or

16 about the sixth day of September, A. D. 1894, commenced an action in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis & Clarke, wherein this defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the first day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged, and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute and deliver to this defendant a good and sufficient conveyance in fee-simple absolute, free from all encumbrances for the premises mentioned and described in the complaint in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order and decree the said plaintiff, on or about the first day of July, A. D. 1895, made and executed a deed to this defendant of and for the said premises and of all the mineral therein contained; and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereunto annexed, marked Exhibit "B," and made a part of this answer. And this defendant avers that in and by the said proceedings and the said deed the said plaintiff is estopped from claiming any part of the said compromise ground or thirty-foot strip aforesaid, or any mineral contained therein.

17 Wherefore, having fully answered, the defendant prays to be hence dismissed without day, and for its costs in this behalf expended.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

STATE OF MONTANA, *County of Lewis and Clarke, ss:*

Alexander Burrell, being first duly sworn, deposes and says: the above-named defendant is a corporation, and I am an officer thereof, to wit, I am its general manager; I have read the foregoing answer and know the contents thereof, and the facts therein stated are true to the best of my knowledge, information, and belief.

ALEXANDER BURRELL.

Subscribed and sworn to before me this thirtieth day of June, A. D. 1899.

W. E. CULLEN, JR.,
Notary Public in and for the County of Lewis & Clarke, Montana.

EXHIBIT "A."

Know all men by these presents, that I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars, for the payment of which, well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

18 Sealed with my seal and dated this seventh day of March, A. D. 1884.

The consideration of this obligation is such that, whereas, a certain cause now depending in the District Court of the Third Judicial District, Lewis & Clarke county, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger, for patent, now pending in the United States landoffice at Helena, Montana.

Now, then, in consideration thereof, and in the further consideration of one dollar, to the said Charles Mayger in hand paid, by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises, and agrees to proceed at once upon his application now pending in the United States landoffice at Helena, Montana, for a patent to the St. Louis Lode Claim described therein, and situated in Lewis & Clarke county, Montana Territory, and procure as soon as practicable a government patent therefor, and, when such title shall have been procured according to said application, said Charles Mayger hereby covenants, promises, and agrees, upon the demand of the said

William Robinson and James Huggins and Frank P. Sterling, or their assigns, to make, execute, and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece, or parcel of mining ground, situate
19 in Lewis & Clarke county, Montana territory, and comprising a part of two certain quartz lode mining claims, known as the St. Louis Lode Claim and the Nine Hour Lode Claim, and particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode Claim, between corners two and three, two hundred and twenty-six feet (226) to a point on the boundary line of the St. Louis lode between corners one and two; thence south 20 degrees, 28 minutes west along said boundary line, between corners one and two, 60.5 feet to corner No. 2, of St. Louis lode, 400.31 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees, 10 minutes west along the line of boundary of St. Louis lode, between corners three and four, thirty feet to a point; thence north 50 degrees, 28 minutes east along a parallel to the boundary line of the St. Louis lode, between corners two and three, 230 feet to the point of beginning, including an area of about 12.844.50 square feet, together with all the mineral therein contained. And if the said Charles Mayger, his heirs or assigns, shall make, execute, and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void, otherwise to be and remain in full force and effect.

20 Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL.]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

TERRITORY OF MONTANA, *County of Lewis & Clarke, ss:*

On the seventh day of March, eighteen hundred and eighty-four, personally appeared before me, R. H. Kemp, a notary public in and for the said county of Lewis & Clarke, Territory of Montana, Charles F. Mayger, whose name is subscribed to the annexed instrument as party thereto, personally known to me to be the same person described in and who executed the said annexed instrument as a party thereto, and who duly acknowledged to me that he executed the same freely and voluntarily, and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in the certificate first above written.

[NOTARIAL SEAL.] R. H. KEMP,
Notary Public.

Filed and recorded March 8, 1884, at 3 P. M.
O. B. TOTTEN.

21 EXHIBIT "B."

Deed to St. Louis Mining and Milling Co. of Montana to Montana Mining Co., Ltd.

This indenture, made and entered into this first day of July, in the year of our Lord one thousand eight hundred and ninety-five, between the St. Louis Mining & Milling Company of Montana, an incorporation duly organized under the laws of the State of Montana, by William Mayger of the county of Lewis and Clarke and State of Montana, its duly authorized agent and attorney in fact, the party of the first part, and the Montana Mining Company, Limited, an incorporation duly organized under the laws of the Kingdom of Great Britain and Ireland, the party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part and to its assigns forever, all and singular those certain premises, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana, more particularly bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south 39 degrees 32 min-
22 utes east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode Claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode Claim between corners one and two; thence south 20 degrees 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of the said St. Louis Lode Claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the said boundary line of the St. Louis Lode Claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing

quartz-rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party
23 of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises, with the appurtenances and privileges thereto incident, unto the said party of the second part and its assigns forever.

In witness whereof, the said William Mayger, as attorney in fact and agent as aforesaid for the said party of the first part, has hereunto subscribed its name, set his hand and seal this first day of July, A. D. 1895, as its said agent.

ST. LOUIS MINING & MILLING CO., [SEAL.]
By WILLIAM MAYGER,
Its Agent and Attorney in Fact.

STATE OF MONTANA, *County of Lewis & Clarke, ss:*

Be it remembered that on this first day of July, A. D. 1895, personally appeared before me, Harry H. Yeager, a notary public in and for county of Lewis & Clarke, and State of Montana, the St. Louis Mining & Milling Company of Montana, by and through William Mayger, its duly authorized agent and attorney in fact, personally known to me to be the same person described in and who executed the said foregoing instrument as such agent and attorney in fact, who duly acknowledged to me that, as such agent and attorney in fact, he executed the same freely and voluntarily and for the uses and purposes therein mentioned.

24 In witness whereof I have hereunto set my hand and affixed my official seal this the day and year first herein in this certificate written.

[NOTARIAL SEAL.] HARRY H. YEAGER,
Notary Public.

[Endorsed:] No. 291. (Title of Court and Cause.) Answer to Supplemental Complaint. Filed and entered June 30, 1899. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the fourteenth day of July, 1899, the replication of said plaintiff was filed, being as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

No. 291.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Replication.

And the said plaintiff, for replication to the answer of the said defendant and the new matter set up by way of estoppel in said defendant's answer, waiving no objections to the competency of the same in this action at law, as to the third paragraph in said
25 answer, denies that plaintiff is estopped for any of the causes or reasons set up in the said answer, or any other cause or reason, from claiming any of the mineral found, or that may be at any time hereafter found, in said thirty-foot strip or compromise ground.

Admits that the said bond was executed as in said answer stated, and avers that the same was executed and made on account of an application of the said Mayger for a patent to the said St. Louis Lode Mining Claim, and on account of an adverse claim interposed by the said defendant's predecessor in interest of said thirty-foot strip or compromise ground, as being a part of what is known as the said Nine Hour Quartz Lode Mining Claim.

Admits that the said Mayger agreed to convey said thirty-foot strip or compromise piece of ground, with all the minerals therein contained, to the predecessor in interest of the said defendant, and avers that the said claim of plaintiff comprises no minerals contained in or beneath said thirty-foot strip or compromise ground, except such as is contained in leads, lodes, or ledges, which have their tops or apexes within the St. Louis Quartz Lode Mining Claim, exclusive of said thirty-foot strip or compromise ground.

And the said plaintiff further avers that it is seeking to recover only such quartz-rock or ore and the value thereof, and the damages for the removal and conversion of the same, as comprises lodes, leads or ledges having their tops or apexes within the boundary lines of the said St. Louis Lode Mining Claim, exclusive of the said thirty-foot strip or compromise ground.

26 Admits that said Mayger obtained a patent for the said thirty-foot strip or compromise ground, but denies that any conveyance was made by him to plaintiff to defraud any one, and avers that all matters in relation thereto have been concluded by the judgment of the Court and the deed mentioned in said defendant's answer executed in pursuance thereof.

And the said plaintiff, for further replication to the new matter set up in the said defendant's answer, shows unto this Honorable Court that the said thirty-foot strip or piece of compromise ground

comprised a part and portion of what was known as the Nine Hour Lode Claim mentioned in the said defendant's answer, and that no other right or title has been conveyed by reason of the said deed than such as attached and incident to the said thirty-foot strip or compromise ground, and that the minerals therein contained were intended to compromise and did comprise only such minerals as were contained in veins, lodes, or ledges having their tops or apexes inside of the said thirty-foot strip, all of which will more fully appear by reference to a certified copy of the judgment-roll in the case hereinbefore referred to and filed in the equity suit in aid of this action, and which plaintiff asks may be considered in this cause as though reproduced and fully set forth at large.

And plaintiff alleges the fact to be that the said thirty-foot strip or compromise ground was at all times a part and portion of the quartz-lode mining claim, known as the Nine Hour Claim, and that the same was never a part or portion of the St. Louis
27 Quartz Lode Mining Claim mentioned in the complaint herein, and that in an action heretofore pending between the parties hereto in District Court of the First Judicial District of the State of Montana, in and for the county of Lewis & Clarke, in which said action the defendant herein was plaintiff, and this plaintiff and Charles Mayger, one of its predecessors in interest, were defendants, which said action was based upon the agreement mentioned in said answer and was brought for the purpose of compelling the defendants therein, in accordance with said agreement to execute and deliver to the plaintiff therein a good and sufficient deed for the premises known as the thirty-foot strip or compromise ground and mentioned in the answer in this action, it was found and determined by the Court, as a matter of fact, that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour Lode Mining Claim, and was by the parties to said agreement agreed to be a part thereof, and that the said agreement with the said Charles Mayger, a copy of which is attached to the amended answer herein, was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim, the boundaries of which claims had been and were at the time of the execution of the said agreement in conflict, and concerning which a controversy then existed between the parties to said agreement; and plaintiff further alleges that the deed mentioned in said answer, and a copy of which is annexed thereto, is the deed
28 which the Court adjudged in said action should be executed for the purpose of performing the agreements above referred to.

Wherefore, plaintiff demands judgment as heretofore demanded in its amended and supplemental complaint.

E. W. TOOLE AND
THOMAS C. BACH,
Attorneys for Plaintiff.

STATE OF MONTANA, *County of Lewis & Clarke, ss:*

William Mayger, being duly sworn, deposes and says: That he is an officer, to wit, the superintendent and general manager of the above-entitled plaintiff, which is a corporation; that he has read the foregoing replication, and knows the contents thereof; and that the matters stated therein are true to his best knowledge, information and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this fourteenth day of July, 1899.

[SEAL.] HARRY HARRIS,
Notary Public in and for Lewis & Clarke County, Montana.

Due and timely service of a copy of this replication acknowledged and admitted this fourteenth day of July, 1899.

CULLEN, DAY & CULLEN,
Attorneys for Defendant.

29 [Endorsed:] No. 291. (Title of Court and Cause.) Replication. Filed and entered July 14, 1899. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 7th day of July, A. D. 1905, the verdict of the jury was filed herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and assess its damages at the sum of one hundred and ninety-five thousand and no/100 ($195,000.00) dollars.

H. G. PICKETT, *Foreman*

[Endorsed:] No. 291. (Title of Court and Cause.) Verdict. Filed and entered July 7th, 1905. Geo. W. Sproule, Clerk.

30 And thereafter, to wit, on the 7th day of July, A. D. 1905, a judgment was duly entered herein which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

ST. LOUIS MINING AND MILLING COMPANY (a Corporation), Plaintiff,

vs.

MONTANA MINING COMPANY, LIMITED (a Corporation), Defendant.

Judgment.

Be it remembered, that on the 29th day of May, A. D. 1905, the above-entitled cause came on for hearing, and the same having been duly submitted to a jury of twelve lawful men duly empaneled and sworn to try the issues herein, the following verdict was duly returned into court, to wit: "Title of Court—Title of Cause.

We, the jury in the above-entitled cause find for the plaintiff, and assess its damage at the sum of one hundred and ninety-five thousand dollars ($195,000.00).

H. G. PICKETT, *Foreman.*"

31 It is therefore considered, ordered and adjudged, that the plaintiff have and recover from the said defendant the sum of one hundred and ninety-five thousand dollars ($195,000.00), together with its costs in this behalf expended, taxed at the sum of nine hundred twenty-six and 80/100 dollars ($926.80), and that it have execution therefor.

Dated this 7th day of July, A. D. 1905.

Judgment entered July 7th, 1905.

[SEAL.] GEO. W. SPROULE, *Clerk.*

Attest a true copy of judgment as entered.

[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES OF AMERICA, *District of Montana, ss:*

I, Geo. W. Sproule, clerk of the United States Circuit Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 7th day of July, 1905.

[SEAL.] GEO. W. SPROULE, *Clerk.*

[Endorsed:] No. 291. (Title of Court and Cause.) Judgment-roll. Filed and entered July 7th, 1905. Geo. W. Sproule, Clerk.

32 And thereafter, to wit, on the 14th day of August, A. D. 1905, a bill of exceptions was duly allowed, signed, and thereafter filed, which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Bill of Exceptions.

Be it remembered that the above-entitled cause came on for a retrial on the 31st day of May, A. D. 1905, that being one of the days of court of the April term of said court, on a remittitur from the Circuit Court of Appeals, of which the following is a copy, to wit:

Remittitur.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Circuit Court of the United States for the District of Montana, Greeting:

Whereas, lately in the Circuit Court of the United States for the District of Montana, before you, or some of you, in a cause
33 between the St. Louis Mining and Milling Company of Montana, Plaintiff, and the Montana Mining Company, Limited, Defendant, No. 291, a judgment was duly filed and entered, which said judgment is of record in the said cause in the office of the clerk of said Circuit Court (to which record reference is hereby made and the same is hereby expressly made a part hereof), as fully and at large appears by the inspection of the transcript of the record of the said Circuit Court, which were brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of, respectively, a writ of error on behalf of the Montana Mining Company, Limited, allowed on the 7th day of October, in the year of our Lord one thousand eight hundred and ninety-nine, entitled The Montana Mining Company, Limited, *vs.* The St. Louis Mining and Milling Company of Montana, No. 567, and a writ of error on behalf of the St. Louis Mining and Milling Company of Montana, allowed on the 30th day of January, in the year of our Lord one thousand nine hundred, entitled, The St. Louis Mining and Milling Company of Montana *v.* The Montana Mining Company, Limited, No. 594, agreeably to the act of Congress in such cases made and provided;

And whereas, on the 9th day of February, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Circuit Court of Appeals, on the transcript of the record upon the said writ of error on behalf of The Montana Mining Company, Limited, and was duly submitted;

And whereas, on the 14th day of May, in the year of our
34 Lord one thousand nine hundred, in the said cause upon the said writ of error on behalf of the Montana Mining Company,

Limited, a judgment was duly filed and entered by the said Circuit Court of Appeals affirming the said judgment of the said Circuit Court; from which judgment of the said Circuit Court of Appeals, a writ of error on behalf of the Montana Mining Company, Limited, was thereafter duly sued out and allowed to the Supreme Court of the United States;

And whereas, on the 14th day of May, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Circuit Court of Appeals on the transcript of the record upon the said writ of error on behalf of the St. Louis Mining and Milling Company of Montana, and was duly submitted;

And whereas, on the 8th day of October, in the year of our Lord one thousand, nine hundred, in the said cause upon the writ of error on behalf of the St. Louis Mining and Milling Company of Montana a judgment was duly filed and entered by the said Circuit Court of Appeals reversing the said judgment of the said Circuit Court and remanding the cause for a new trial in respect to certain alleged damages; from which judgment of the said Circuit Court of Appeals a writ of error on behalf of The Montana Mining Company, Limited, was thereafter duly sued out and allowed to the Supreme Court of the United States;

And whereas, on the 19th day of May, in the year of our Lord one thousand nine hundred and two, as appears from the man-
35 dates issued out of the said Supreme Court of the United States to the said Circuit Court of Appeals and filed on the 9th day of June thereafter, the aforesaid writs of error on behalf of the Montana Mining Company, Limited, sued out and allowed to the said Supreme Court of the United States as aforesaid, were dismissed, for the want of jurisdiction;

And whereas, on the 6th day of October, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said Circuit Court of Appeals on the said transcripts of the record and the petition of the Montana Mining Company, Limited, for the issuance of a single mandate in the cause, etc., and was duly submitted;

And whereas, on the 8th day of October, in the year of our Lord one thousand nine hundred and two, the following judgment was duly filed and entered:

36 "United States Circuit Court of Appeals for the Ninth Circuit.

Nos. 567 and 594.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff in Error,
vs.
THE MONTANA MINING COMPANY LIMITED, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Montana.

This cause having come on to be heard on the transcripts of record from the Circuit Court of the United States for the District of Montana upon the writ of error sued out by The Montana Mining Company, Limited, Plaintiff in Error, *vs.* The St. Louis Mining and Milling Company of Montana, Defendant in Error, and upon the writ of error sued out by The St. Louis Mining and Milling Company of Montana as Plaintiff in Error *vs.* The Montana Mining Company,
37 Limited, as defendant in error, both writs of error being sued out to correct errors charged concerning the same judgment, and said causes having been argued and submitted by counsel, and separate judgments having been made and entered therein at different dates, and the Court having by its last judgment herein reversed the judgment of the said Circuit Court:

It is now ordered and adjudged, that the judgments so heretofore made and entered herein be vacated and set aside, and that in lieu thereof it is ordered and adjudged that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs, and the cause is remanded to said Circuit Court for a new trial."

You, therefore, are hereby commanded that such new trial and further proceedings be had in said cause in accordance with the judgment of this Court filed and entered on the 8th day of October, in the year of our Lord one thousand nine hundred and two, and as according to right and justice and the laws of the United States ought to be had, the said judgment of the said Circuit Court notwithstanding.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of October, in the year of our Lord one thousand nine hundred and two.

F. D. MONCKTON, *Clerk.*

Taxation of costs: Total taxes at $242.50.

[Endorsed:] Title of Court. Title of Cause. Remittitur. Filed and entered Oct. 31, 1902. Geo. W. Sproule, Clerk. By F. H. Drake, Deputy Clerk.

38 The jury having been duly impaneled and sworn to try said cause, the plaintiff to maintain the issues on its part introduced and had sworn one John R. Parks who testified substantially as follows, to wit:

JOHN R. PARKS.

I am a consulting mining engineer and have followed my business for twenty-five years. I entered the employment of the plaintiff in this case in that capacity about the year 1892, and have been continually in its employ since that time, though I have been engaged in other matters during that period. As such engineer, I assisted in making the map used in this case known as Plaintiff's Exhibit No. 1. My associate in that work was Mr. James Keerl, who is a civil engineer by profession. The map is a colored photograph from a tracing of the original working mining map and it is a correct representation of the exterior boundaries of the St. Louis claim so far as exhibited. It is very accurate throughout.

The photograph, in order to distinguish levels, was colored by Mr. Keerl and myself as you see on this map. The map is, what is termed by engineers, a plane map. In other words, it is a map on a horizontal plane and as if you were looking down on the object depicted. As to the colors, the 400-foot level appears in a dark gray, the 85-foot level in a brownish yellow, the 40-foot level in red, the 20-foot level in yellow, the 50-foot level in blue, the 190-foot level in brick red. The connection on the vein either from level to level, or from the surface to a given level, is either a shaft when it
39 comes from the surface, or a winze when it comes from level to level. When we look down from the surface, a shaft appears to us simply as a straight line and is represented on the map in black parallel lines. The Montana nine hour shaft is from the surface to the 190-foot level. Now, as that shaft does not run in a straight line on that vein, the lines change to an angle to show that fact. As looking down from above, you could see only the top of a shaft, it is depicted on the map by a square, a part of which is in deep black and the other in outline. The stoped ground shown in the southeasterly portions of the map is outlined in black lead pencil which gives it a dark grey figure. The plane, called datum plane, upon which this map is drawn, is the assumed altitude of corner No. 2, 2,000 feet, so that anything that is under two thousand feet is below the datum plane, anything that is above it is up higher on the hill.

The vein is found on the flank of a mountain, the surface of which is very irregular. The mountain rises at an angle of about 30°. The 520-foot plane is 520 feet from corner one, and is parallel to the north end line and is marked on the map "projected line parallel to the end line 520-foot plane." The 108-foot plane and the 133 plane are also designated and are respectively 108 and 133 feet distant from the intersection of the west side line of the 30-foot strip with the east side line of the St. Louis claim between corners one and two. On this map when you find a level defined in the same

color and two parallel lines connected with a color connection,
40 that is a cross-cut. The 65-foot shaft is a shaft sunk on the St. Louis discovery vein. The 65-foot cross-cut is 87 feet below the 85-foot level. The points marked "discovery shaft" and "discovery drift" show the location of workings on the discovery vein. What is designated on the map in sort of a bluish green color, is the Transcontinental tunnel which is driven on a fault fissure. Following along the line of the Drumlummon lode are surface cuts marked on the map. These are outlined in black ink and marked and numbered as cut No. 12, No. 13, etc.

Cross-examination:

I first became acquainted with the vein or lode in controversy in '91 or '92. My work was not entirely for the purpose of getting evidence for lawsuits, pending between these parties, but a good part of it was for that purpose. The surveys for this map were made in 1892 or 1893. The complaint in this action was filed in '93. I assisted Mr. Keerl in making the surveys and in drawing the maps. The boundary lines were taken from the United States patents. The west line of the nine hour does correspond to the line shown on the patent. The map shows the west side line of the nine hour to the point where it intersects the south boundary of the St. Louis claim. On the diagram in the patent a line is shown from the point of such intersection to corner numbered 1 of the nine hour but the area thus shown in conflict with the St. Louis is expressly excluded in the patent.

41 Plaintiff also called and had sworn as a witness in its behalf who testified as follows, to wit:

William Mayger.

I reside at Marysville, Montana. My business is mining. I have been engaged in that business for about 41 years, principally around Silver Camp and Marysville. I know the St. Louis Lode Claim. It lies southeast of the town of Marysville on the side of a mountain, known as Cruse mountain. The original location of the St. Louis Lode, was at the point marked on the map as the 65-foot shaft. There is a vein connected with that original discovery.

Whereupon the witness was asked the following question:

Q. Which direction does it run?

To which the defendant objected on the ground that the same was irrelevant and immaterial. For that, the direction or strike of the discovery vein is not in issue, being no allegation whatever contained in the complaint relating to the strike or dip of the discovery vein, which objection was overruled by the Court, and the witness permitted to answer such question, to which said ruling of the Court, the defendant then and there excepted.

A. It runs very nearly parallel with the side lines of the St. Louis as staked. We have traced the vein to within 95 feet of the end line at the south end, and to a distance of about 400 feet from the north

end. It dips to the east at an angle of about 80° from a horizontal. We have sunk on this vein, to a depth of about 425 feet. The
42 St. Louis company has extracted over forty-one thousand dollars' worth of ore out of the discovery vein in both the north and south drifts from the Transcontinental tunnel. That part of the vein disclosed in the southerly drift of the Transcontinental tunnel is developed on the lower levels to within 95 feet of the south end line, and it is a good, strong, vein at that point extending in the direction of the end line.

I know the Drumlummon vein. At the point on the map designated as the 520 foot plane, the hanging wall of the Drumlummon vein is within the St. Louis claim, by a distance of about 5 feet, and the apex is wholly within the St. Louis claim, from that point to the 108-foot plane. It runs parallel or comparatively so with the St. Louis, between corners numbered 1 and 2, and the dip is to the east, at an angle of 56 to 60 degrees at the surface, and on the lower levels as high as 70 or 72 degrees. I have examined the lower levels of the vein down to the 1600-foot level of the Montana company. The hanging-wall of this vein passes out of our surface at the 108-foot plane as marked on the map Plaintiff's Exhibit No. 1, and a part of the apex of the lode continues in our ground until it passes the 133-foot plane.

The Montana company has stoped out the ore above the 190 level up to the 108-foot plane. We have traced the hanging-wall clean up to the 108-foot plane, and the foot-wall to within 160 feet, I should judge, of the south end line. We have run levels on the walls, and traced them all through the levels. I have made this vein
43 a study for years. Our apex shaft No. 2 practically joins on the surface the Montana company's apex shaft, and lies south of the 108-foot plane, about 5 feet. The other side of the shaft is within about 15 feet of our 133-foot plane. The workings here are much caved. It is possible that one could climb down the Montana company's apex shaft, but it is much crushed and caved.

The 20-foot level shown on the map is marked in pale yellow. It starts from probably 60 or 75 feet west of its intersection with the east side line of the St. Louis ground and follows the vein in and connects with the Montana company's apex shaft. Underneath that level we started what is termed the Roadside tunnel; that is a cross-cut tunnel and penetrates the vein immediately under the St. Louis company's apex shaft, then it follows the vein south until it passes beyond the 133-foot plane, and from there it turns and runs back; runs west until it intersects the foot-wall of the vein. Below the 40-foot level and the roadside tunnel, we have got what we term the 85-foot level, which connects at the north end with the 30-foot level, on the hanging-wall of the vein north of the 520-foot plane, and connects that level with a raise in two places on the south end of that level. From that point it follows as near to the surface as it can. Immediately under the hanging-wall of the Drumlummon, it reaches the winze that connects the forty-foot level with the 85-foot level. The vein is disclosed under the hanging, its entire length up to that point.

Within that distance there are a number of cross-cuts that
44 run to the foot-wall of the fissure or vein. The first cross-cut to the foot is at a point in the level marked "4" on the map, being one of the stations of the survey of the 85-foot level. The vein at that point is 21 or 22 feet in width. Going southerly along the level from that point a distance of about 60 feet, there is another cross-cut that runs to the foot-wall. From the end of this cross-cut is a level following the foot-wall clean through to immediately behind the winze of the St. Louis company, between the 40-foot level and the 85-foot level. From the foot to hanging-wall is a distance of about 17 feet. From where the 85-foot level terminates, going northerly for about 60 feet, the ore has been entirely stoped out up to the surface, by the St. Louis company, that is, the greater portion of the vein, leaving a lot of low-grade ore between the stope and the foot-wall. There is a brattice in the level at the bottom of the winze. I have found pay ore within 8 or 10 feet of the point where the 133-foot plane crosses the west line of the compromise ground and down below, I have found ore immediately underneath that point. Witness here produced a sample of the ore found beneath the crossing of the 133-foot plane.) I do not remember the exact point at which I found this ore, but think it was about 20 feet below the surface. The 85-foot level is partly in the gouge following the hanging-wall, with very little in it and has no particular value up to the point of the beginning of our stope.

45 From the portion of the vein that we stoped out, we realized $111,000.00 out of it. The average of it would be $100.00 a ton. We shipped a good deal of ore there that might be termed float in connection with the vein immediately below the apex. We were confined to a vertical plane on all sides by an injunction covering the thirty-foot strip. I have been in the premises of the defendant east of the west side of the line of the compromise strip. The ground at this point is stoped out from the surface down to the 190-foot level of the Montana company.

Whereupon the witness was asked the following question:

Q. Point out to the jury northerly of the 133-foot plane, where the stopes have been taken out.

To which question the defendant objected for the reason that the same is irrelevant and immaterial, for the reason that the stoping referred to lies north of the 133-foot plane, as drawn on the map, and is not confined to such stoping as has been done in that portion of defendant's ground where the apex of the lode is found in plaintiff's ground, lying north of the 108-foot plane. In other words that the inquiry relates to the territory lying between the two planes as drawn on the map, and that it has been established by the testimony and by the pleadings in the case, that between these planes the whole of the apex is not within the plaintiff's territory.

The Court in overruling said objection, said:

"I do not deem it necessary to consider with the very
46 strictest exactness the definite line between what is termed the law of the case and what may be called an advice by an ap-

pellate to an inferior court. But I hold this to be a correct principle, that where a trial court has ruled upon a material matter in one way, and an appeal is taken to a higher tribunal and such higher tribunal considers the question presented as necessary for its consideration, and does duly consider such question, and does express a positive opinion thereon, and makes a decision that the trial court erred in its refusal to admit evidence upon the direct question considered, and therefore remands the case for a new trial, it becomes the duty of the trial court upon such new trial to follow the opinion of the appellate tribunal, unless it should be made to appear that a substantially different state of facts exists from that upon which the appellate tribunal based its decision, or unless the appellate tribunal was clearly misled as to the facts by accident or omission of some kind, or unless the decision of the appellate tribunal or its reasoning has been reversed by a still higher tribunal.

"I find, upon the examination of the opinion of the Circuit Court of Appeals in this case, 104 Fed. 664, that the question considered was this: 'When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim, and partly within the other, to whom does such portion of the vein belong?' The Court answered this question by
47 referring to the opinions of the Supreme Court of the United States, stating that 'The only deduction which can be made from the foregoing views is that inasmuch as neither statute permits a division of the crossing portion of the vein, and the weight of authority favors a senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line.'

"Continuing, the Court says: 'It follows that the court below erred in its refusal to admit the evidence offered as to the value of ore taken from the Drumlummon vein on its dip between the planes designated as the 108-foot and the 133-foot planes, and the cause is therefore remanded for a new trial, as to damages alleged and recovery sought for conversion of ore between the planes indicated.'

"Any other general rule than that which I have laid down would be countenancing the doctrine that if a trial judge may entertain an opinion different from that expressed by the appellate tribunal within his circuit, he may, by refusing to follow such higher court, interfere with the orderly administration of judicial proceedings which very plainly must be preserved for the harmony of the entire system of jurisprudence. The effect of such a course would be to impair the stability of judicial decision by the higher courts and oftentimes to throw the burden of appeal upon him who has been declared in the right by the higher court, and as a consequence the adminis-
48 tration of justice would be unnecessarily delayed and confusion ensue.

"Were the difficult question presented, a new one to me apart from the advice of a learned Circuit Court of Appeals, the duty would, of course, devolve upon me to decide it by original opinion. Upon the point itself, which is complex, while I realize that there is force in

the argument of the counsel for the defendant; on the other hand, the Circuit Court of Appeals, in making its deduction from the decision of the Supreme Court referred to in its opinion, rests upon the fundamental doctrine that the intent of the statute is to preserve to the minor the full benefit of his discovery, and that in expounding the law courts should not lose sight of the rule that if the miner has the apex in his location he is to have the vein, and the right of pursuit of the vein on its dip as defined by the statute, and that the senior locator, in the absence of statute and authority is to be favored under conditions of facts like those presented in this case.

"But as the rights of the parties hereto are to be determined upon this trial by the unmistakable language of the Circuit Court of Appeals, any reasoning of mine upon the question, which is difficult, would not be of material concern."

Thereupon the defendant added to its objection aforesaid that it was alleged in the pleadings and shown by the testimony,
49 that the hanging-wall of the Drumlummon vein passed out of the plaintiff's ground at the 108-foot plane.

But the Court overruled such objection and the whole thereof, to which ruling of the Court the defendant then and there duly excepted. And it was stipulated between counsel in open court that said objection should apply to all testimony that might be offered or given relative to any ores mined by the defendant, between the two planes as drawn down on the map. The same stipulation, it was agreed, should cover all testimony offered by plaintiff relating to the course or dip of its discovery vein, and that defendant need not further object to such testimony, the objection already made being sufficient.

A. The entire vein is stoped out between the 108 and the 133-foot planes, from the surface to the 190-foot level of the Montana company's works. There is a stope at the end of the 190-foot level from the 133-foot plane in beyond the 108-foot plane, possibly 30 or 35 feet. The last end of that level for a short distance has no stoping above it, but from the point where the stoping begins to the 133-foot plane, it has been stoped out up to the surface, by the defendant. There is a stope at the end of the 85-foot level which is entirely north of the 108-foot plane. There is also a stope commencing about 30 feet below the apex of the Montana company's shaft, and extending into the 20-foot level, probably 10 or 12 feet.

I am the general manager of the St. Louis Mining and Milling Company, and have been such manager since the organization
50 of that company. I think the ore extracted by the Montana company at the points named by me, was much better ore than that which we extracted north of the compromise line. I had Professor Parks and Mr. Keerl measure up the stopes taken out by the defendant and compute the number of tons that had been so taken. I took the sample of ore referred to by me, vertically under the 133-foot plane at the point marked "J" on the map at a depth of about a foot below the elevation of point "J," which would be about 65 feet below the surface of the datum line.

The stope at the end of the 190-foot level was taken out in the

summer of 1893, also the stope on the 20-foot level. I believe this is termed Block 9. The stope marked Block 8 at the end of the 85-foot level was taken out in '98 or '99. These numbers were given these blocks by our surveyors at the time of the making of the survey. The value of the ore taken out by us ran from $50 to $300 a ton, estimating it in carload lots. In giving my valuations, I gave the valuation as net returns, not the assay value, but what we received back from the smelter, which was 95 per cent. of the assay value, and deducted the cost which reached all the way from $12 to $24 a ton. The ore bodies mined out by us on our side of the line and the ore bodies mined out by the defendant on its side of the line adjoined each other. While the defendant was engaged in extracting this ore, I made efforts to get into its property to see it, but I only got in under an order of the Court. I was refused
51 admission to their mine, until I had obtained an order. I went in with Professor William B. Potter of St. Louis, in either 1894 or '95. I have also been in there with other persons since then under similar circumstances.

The location of the St. Louis was made in September, 1878, but there had been a prior location of the same ground. I was in Butte at the time it was located and I wrote from there to my brother Charlie, who was in Marysville, directing him to make the location. The location was made on what we term the 65-foot shaft.

Cross-examination:

The location was made by my brother, in his own name. I had no legal interest in it. I was one of the organizers of the St. Louis Mining and Milling Company. Mr. James Sommerville and Mr. Michael Karnett of St. Louis were also interested in it. After the company was organized, one-half of the stock was issued to me, and one-half of it to my brother Charlie. I presume I paid the expenses of patenting the claim and also the expenses of fighting the adverse suit. The company at the time of its organization had no other property than the St. Louis lode and millsite, except that $125,000.00 of the capital stock was put into the treasury. I have always been the manager of the company. The adverse suit was settled by the execution of the bond spoken of in the answer in this case. There was a demand made for the performance of the bond in the spring of 1887. I participated in the suit for the specific performance of the
52 bond. The suit was appealed to the Supreme Court of the United States, and resisted by the St. Louis Company. I executed the deed for the company under the order of the court. I had charge of the litigation between the parties to this action in the former suit. That case was tried in April and May, 1893.

I have no absolute knowledge as to my seeing the original notice of location posted at the 65-foot shaft. I assume that my brother Charlie made that discovery on the 65-foot shaft and assume that was his discovery shaft. What is marked here on the map as the discovery shaft was known as the discovery shaft of the Ivanhoe lode. I did not say to the jury on my direct examination that I saw the notice of location posted on the 65-foot shaft.

If the notice of location was posted on the 65-foot shaft when I got back from Butte, I would assume that that was the discovery shaft of the St. Louis lode and should be so marked on this map. Tracing the lode on the surface, there is a shaft or prospect hole near the south line, but it is not connected with any of the underground workings. I assume that it is a continuation of the vein. There are no other workings on the surface near the south end in which the vein is shown. Its course, however, is shown by the stopes below. We commenced prospecting for the vein in 1876; we located the Ivanhoe. We did not hunt any more for the vein after 1878. In the bottom of the 65-foot shaft there is a level running south for a distance of 140 or more feet, the discovery
53 vein dips to the east. The level I speak of runs to the Transcontinental tunnel, that tunnel cuts the vein and throws the lead a distance of about 90 feet. The level that runs from the Transcontinental tunnel to the 65-foot shaft continues on in the same direction a distance of probably two or three hundred feet further. It it not on the map because it was never surveyed by an engineer.

In the Maskelyne shaft, the width of level on the Drumlummon vein appears to be about 7 feet wide as shown on the map. The narrowest point shown is about 4½ feet. In running the cross-cut from the bottom of the 65-foot shaft, we struck a bunch of quartz about midway. The breast of this cross-cut shows the Drumlummon vein.

The cross-cut is entirely through the vein up to the hanging-wall of the Drumlummon. The gouge on the hanging-wall of the Drumlummon appears in the Hopeful shaft, it also appears in the upraises from the 30-foot level to the surface, and from that point right along to the 85-foot level clean through. This gouge can be traced clear through the 85-foot level to where the brattice is, with the exception that at the south end of the 85-foot the ground has all been stoped out and it does not show there. It is continuous; sometimes it is two feet wide, sometimes only two or three inches wide, but there is always more or less of it. At Cut No. 14 as you stand where the track turns and look at the face of the 85-foot level, the gouge shows very clearly. In the cross-cut of the 65-foot shaft there
54 is a bunch of ore in there, I think, as far as I can judge, it dips to the west. That is my memory as it is pictured in my mind. The Transcontinental tunnel is marked on the map in green, the end of it is over in the Nine Hour ground, and under the Nine Hour ground a distance of probably thirty feet clear past the east side line of the Compromise strip. It runs to the north of these two apex shafts. The tunnel runs practically 500 or 600 feet underground and follows a fault in the granite. It is through porphyry and granite near the mouth of the tunnel. The dip of this fault is to the south. We left the fault at a point immediately under the easterly end of cut 18. I think our caps in this tunnel are 6 feet, I am not sure. There has been no work on the main shaft of the St. Louis on the north end since the shaft was built there. I could not give you the year exactly when the work was done. The 30-foot level north of the shaft is on the foot-wall possibly a distance of 30

feet. It trends towards corner No. 1 of the St. Louis location. It possibly extends northerly 30 feet from the main shaft. There is a cross-cut north of the shaft. I do not remember just how far from the shaft. The cross-cut is a cross-cut to the east. In cut No. 14, both walls of the vein appear 12 or 14 feet apart. At the point, cut No. 14, the vein is 12 or 14 feet wide. On the map of 1893, the apex is represented by a pink band showing a width of about 37 feet by scale. The Transcontinental tunnel fissure passed over
55 the foot-wall of the Drumlummon vein and crossed over the vein. We developed the foot-wall of the Drumlummon vein to within 150 feet of the south end line of the St. Louis vein at the 20-foot level. We had a workman on this end, on Saturday the 29th of May last, developing the foot-wall of the vein.

Whereupon witness was asked the following question:

Q. If that man were at work 78 feet below corner No. 3, and there had been any foot-wall there, will you tell me the width of that apex provided the hanging-wall took the course you indicated by your ruler from the 108-foot plane crossing through the Nine Hour shaft?

To which question the plaintiff objected for the reason that the question assumed a condition that the witness had not sworn to, and therefore not proper examination and immaterial.

Which objection was by the Court sustained.

Whereupon the defendant offered to prove in response to the question that the distance from the point indicated to the plane previously indicated by the witness from the 108-foot plane through the Nine Hour shaft, would be approximately 148-feet surface apex on the south end line.

To which offer the plaintiff objected upon the same grounds.

Which objection was by the Court sustained, and the defendant duly excepted thereto.

The Montana company took out a small stope of ore from their apex shaft running north on the 20-foot level That is the
56 highest working outside of their shaft north. This ore that I am speaking of was taken out in '93. The ore that we took out to the northward of the 108-foot plane was west of the west side line of the 30-foot strip and northward of the apex shaft No. 2 to the point where the hanging crosses the west side line of the 30-foot strip. It might have been 60 feet northward of the 108-foot plane. We stoped between the 85 and the 40 foot as far east as the plane of the compromise line, and between the 40 and 18 or 20-foot level up to the surface. The stope was all the way from 3 to 6 feet, possibly 7 feet wide. We took out all the richest ore. The stulls in timbering average from 2 to 4 or 5 feet. It varies from three to seven feet, the cap would be full width of the level. I would not say that they were over 3½ feet on the surface where you could notice them, because I never noticed it.

When I said in my direct examination that the $111,000 of ore yielded over $100 per ton per carload lots, I meant net after paying all costs, railroad fares, shipping costs, smelter charges, but not hauling from the mine to the railroad. The mining cost is about $1.50

a ton. We have paid as high as $2.00 or $3.00 per ton for mining. The best ore went $300.00 a ton, the worst about $50.00. It was all handled at the smelter or the Big Ox Mill. The report that you showed me is one that I made my company, and the 3260 dry tons of ore referred to in the report yielding gross $111,490.19 is
57 the same ore and the same product that I said yielded $111,-000.00 in the direct examination.

Thereupon as a part of the cross-examination the portion of said report referring to said ore was read in evidence, said report bearing date January, 1901, as follows:

"We have mined and stoped from the Drumlummon vein 3,260 dry tons of ore at a cost of $6.00 per ton or a total of $19,560.00. We shipped 1300 tons of this ore to the smelters, for which we received, after paying freight and smelter charges, $64,539.87; the remaining 1960 tons was shipped to the Big Ox mill, from which we realized in retort and concentrates $46,950.32.

Recapitulation: Mining 3,260 dry tons of ore, $19,560; that is on the debit side.

On the credit side: Receipts from ore shipped smelter $64,539.87. Also on the credit side receipts of ore milled, Big Ox Mill, $46,490.19. The debit items are made up of the mining cost just stated, mining 3,260 dry tons of ore, $19,560. Excess of receipts above expenses $91,930.19."

Redirect:

On redirect examination the witness was interrogated and replied as follows:

Q. You testified on your direct examination about the course of your discovery vein as compared with the Drumlummon. I forgot to ask you about the map. I have had another map made since. I would like to do so now, as part of my direct. I will ask
58 you to look at that map (showing witness map) and see if the general course and the general situation is illustrated by it?

A. I think, generally speaking, it does, so far as I know anything about it.

Q. Do you know who prepared that map, or rather the little ones from which that is a copy?

A. No, sir, I do not.

Q. Do you know who prepared this one (showing witness a small map)?

A. No, sir, I do not know who prepared it.

Q. I will ask you whether that is a fair illustration so far as you know it. Here is the little one I think you have seen before. One is a copy of the other.

A. I think it is a fair enough illustration. The discovery vein there, according to my idea, there is not so much of a throw on the fault line the two ends ought to be nearer together here, and this line out here (indicating) ought to be a little bit higher up toward that point, otherwise it is all right.

Whereupon plaintiff offered the said map in evidence.

To which the defendant then and there objected for the reason that

it contradicted the map that had already by stipulation been attached to the complaint in the action, in that it showed the departing foot-wall to be at a point southerly of the 133-foot plane and carried the foot-wall out through both of the end lines of the claim. Also for the reason that there is no testimony showing when, by whom,
59 or for what purpose the map was made, and that it was a contradiction so far as the course of the discovery vein was concerned, of the map introduced in evidence and marked Plaintiff's Exhibit No. 1. It also contradicted the testimony of the witness on the stand in that it showed the departure of the hanging-wall of the vein at a point 240 feet northward of the 520-foot plane.

By the COURT: I think that paper may be used as illustrative of the testimony of the witness.

To which ruling of the Court counsel for the defendant excepted.

(The paper was marked Plaintiff's Exhibit No. 3.)

By the COURT: Do I understand that you offer it formally in evidence?

Senator BROWN: I do not claim that this map is correct at all, I never have claimed it, but I think it illustrates this case. That is the reason I wanted to put it in, and the jury may consider it for what it is worth. If there is no objection I should like to ask the jury to have copies of it.

By Mr. WALLACE: Our objection goes to the entire use of the map as evidence. (Blue print copies of the map were handed to the jury. Counsel for defendant excepts.)

And referring to another map appearing on the flyleaf of a report of the St. Louis Mining Company, the witness was asked the following question:

60 Q. I will ask you if that bears a general resemblance to the general situation of the Drumlummon mining claim to the rest of the property?

To which question the defendant objected for the reason that the same is leading.

But the Court overruled such objection and permitted the witness to answer said question.

To which ruling of the Court the defendant then and there duly excepted.

The witness answered:

A. That would be correct if the discovery shaft of the Drumlummon was set a few hundred feet further to the north.

Plaintiff also called and had sworn as a witness in its behalf, one Walter Proctor Jenny, who testified substantially as follows:

WALTER PROCTOR JENNEY.

I am consulting geologist and mining engineer. I was educated in the Columbia School of Mines. I have examined the discovery vein of the St. Louis Lode Mining Claim. Its course is substantially northeast and southwest. I believe that the discovery vein extends

the full length of the claim from end line to end line. Explorations under ground shows that it lies within 750 feet of the north end line, and in the south end it is tracted to within 95 feet of the end line. I find an outcrop within 150 feet of the north
61 end line which I believe to be the outcrop of this discovery vein. The dip of the vein is easterly from 70 to 85 degrees. I know the Drumlummon vein; it enters the St. Louis claim at the 520-foot plane as shown on the map. And from that point to the 108-foot plane, it is entirely within the St. Louis surface. The width of the vein from the hanging to the foot-wall is not uniform, at one point it is only 4 feet and 8 inches, while the greatest distance I find the walls apart is approximately 45 or 46 feet. The material between the walls is crushed and fractured country rock. In some places converted into quartz and mineralized, and at still other places there is ore of sufficient value to work and ship. At the 108-foot plane, the hanging-wall passes into the compromise ground, and between that point and the 333-foot plane there is, going westward from the hanging-wall, 7 feet of quartz which has been stoped and removed. There is next this going west, about 8 feet of quartz. A good part of it is still standing. The width of the vein measured along the 108-foot plane, but not at right angles to the vein is 55 feet. The vein crosses two porphyry dikes and faults both of them. There is a geological difference between the St. Louis discovery vein and the Drumlummon vein. The strike of the veins are very different. The discovery vein is nearly north 45° to 50° east magnetic, while the general course of the Drumlummon in the ground in dispute is about north 10° east. Then the dip of the St. Louis vein is much more vertical than that of the
62 Drumlummon vein. The discovery vein of the St. Louis is broken up. There is a cross faulting, notably on the Transcontinental level, where the faulting on the tunnel level is 90 feet.

Cross-examination:

I first visited the St. Louis property in July, 1899, and spent 20 days on the ground before the previous trial. I spent about three days, but not all of each day on the discovery vein of the St. Louis. The vein is in granite. The trend of the ore chutes are to the south. I gained entrance to the works through the Transcontinental tunnel. I never went down the discovery shaft. The dip of the fissure in the Transcontinental tunnel varies from vertical to westerly at about 15° from the vertical. The direction or strike of the discovery vein is from 45° east magnetic to north 55°. North 45° east magnetic would be north 65° east true. I first went through the east cross-cut run from the bottom of the 65-foot shaft over to the east side line of the St. Louis and slightly beyond. The Drumlummon vein is very nicely exposed at the end of the cross-cut. The walls at that point are in slate. I observed the dip of the discovery vein, it ran from 70° to 85° sometimes. I do not remember any of the points at which I took the dip. The foot and hanging-wall of the Drumlummon are both disclosed in the drift northerly from the bottom of the 65-foot shaft.

North of the 65-foot shaft and on about the same course
63 as that followed by the vein between the Transcontinental tunnel and the bottom of the 65-foot shaft, a level has been run on the discovery vein for quite a distance, most of it in granite with about 25 feet at the extreme northerly in the slates. The vein seemed to be pinched there. I think the length of the drift on the vein north of the bottom of the 65-foot level is about 100 feet.

There is a strong talc seam on the hanging-wall of the Drumlummon, which shows very distinctly at the entrance of the 85-foot level in cut 14. The width of the vein at this point is about 11 feet between the walls. The slate is quite well marked there in places. There is a talc seam on the hanging-wall which is 18 to 20 inches wide. Probably in no place more than 2 feet wide. It contains finely ground material, clay and talc mineralized with it, some quartz but not much. The vein is poorly mineralized there. The general strike of the vein between the 520 and the 108-foot planes is about north 10° east magnetic. North 30° east true. If the 85-foot level had been driven entirely on the hanging-wall side, the finely ground matter and so on would show to the right of the level as an apparent foot-wall. It is a companion wall to the hanging-wall and would seem like a foot-wall to a miner. It would be strong enough to timber against. The seam on the hanging-wall
is a fissure, and if it contains ore at points, a miner would
64 follow it, taking out all of the valuable ore in the vein. They are apt to be sympathetic fissures in slates running more or less parallel with the fissure of the vein containing ore. Going into the 85-foot level, the first cross-cut you encounter is at point 4. There is some quartz at point 4 on both the right and left-hand side of the level. There is more or less mineralized quartz entirely across the vein at this point. Looking overhead at this point, you see the fissure continuing right through it clearly marked, which indicates that the Drumlummon fissure is younger in point of time than the cross-fissure, as the older veins are cut by the more recent ones. Where there is a cross-fissure of this character we generally expect to find greater mineralization because at such a point opportunity is afforded for a freer circulation of the mineralized solutions and gases.

Going southerly from point 4 there is another fissure near apex shaft No. 1. It comes in from the northeast. Going through this fissure, the course of the Drumlummon vein is clearly marked and the course of this vein is marked throughout the level as far as it can be traced on account of stopes. At the extreme southerly point of this level, the country is a good deal disturbed by cross-fissures.

On the surface the 108-foot plane lies about 5 feet northerly of the sides of the two apex shafts which are located together at that point. The ore practically comes to the surface at that point. In taking out this ore, the stulls or caps used by the miner would
65 be as long as the ore body was wide, but the ore body may not fill the space taken out and occupied by the timbers. There is a little cut at the point where the 133-foot plane inter-

sects the compromise line. The point is caved in and if cleaned out, it would not show the quartz coming up there. The point is about 8 feet distant from the edge of the caving that shows the stoping.

Plaintiff also called and had sworn as witnesses in its behalf, JAMES E. JACKSON, ALEXANDER SWAN and FRANK J. LEEDY, who testified substantially as follows, to wit:

That they were quartz miners; that they had in company with each other and with Mr. William Mayger, plaintiff's manager, visited the premises in controversy on the 30th day of May. That they had started at corner No. 2 of the St. Louis claim, and with a tape line had measured northward to a point 63 feet northerly from said point of commencement; that they had then measured southerly along what was pointed out to them as the west line of the 30-foot strip for a distance of 133 feet. That at said point a small trench was dug, probably two feet in length and 6 inches wide, which extended down to the solid formation, from which they took some samples, which they would term vein matter. That at said point no wall was disclosed. That they then went to the 20-foot level, which they followed to the apex shaft and came out at the surface at that point. That there was disclosed in that level lead matter all the way, from which they took several samples that they considered vein matter. That through that level there
66 was no sign of a hanging-wall. They then went down into the 40-foot level, noting that the ground above them had been stoped and that the stopes were about 7 feet wide. That they went down the winze to the 85-foot level. That on said level, ore had been stoped out clean to the brattice, that is at the end of the level. On the north side of the brattice, they measured from the foot to the hanging-wall and found the distance to be 17 feet. That northerly 85 feet from the brattice there was a cross-cut where the width of the vein was again measured and found to be 21 feet. The material between the points being vein matter.

The plaintiff also called and had sworn in its behalf one Joseph W. Wallish, who testified substantially as follows:

JOSEPH W. WALLISH.

I am acquainted with the plaintiff and have known it since 1885. I know where the ground in controversy in this case is located. I have heard the testimony of Mr. Parks and heard him speak of taking certain samples. I was present when those samples were taken. The first sample was taken in the Montana company's apex shaft, it was taken from the northeasterly portion of the shaft. We spread a small canvas down on the floor and Professor Parks took his pole pick and ran it across the solid matter there. Then the portion that fell down was divided into two sacks, and Professor Parks handed the delegation of the Montana company one
67 of them. There were present, Professor Parks, William Jenkins and myself representing the St. Louis company, and

on the part of the Montana company there was William Philpotts, Mr. Thomas Lahiff, Mr. Bob Matthews and Mr. Dave Heron. The same method was followed in the entire sampling; that is, so far as the disposition of the samples taken was concerned.

Cross-examination:

I took care of the samples. It took one day to do the sampling. The first sample was taken 12 or 15 feet down the Montana company's apex shaft from the surface. The next one was taken between 40 and 55 feet, it was also taken from the north side of the shaft. The third sample was taken about 10 feet further down, or in other words about 65 or 70 feet from the surface. It was taken on the north side in the cribbed shaft. The fourth sample was taken about the center of the cribbed shaft. Professor Parks was the only one in the main portion of the shaft, the balance of us later on went down the manway, and we could look into the main shaft and saw him operating. This sample was taken probably 85 to 90 feet from the top of the cribbed shaft. The fifth sample was taken about 12 feet or 15 feet from the bottom of the cribbed shaft, which would be about 115 or 120 feet, something like that, from the surface. The next place that a sample was taken was in the 85-foot level. We had gone up their raise. A canvas was spread down at the breast of the 85-foot
68 level and samples taken. There was a portion of two ore sacks divided up between us, one to us and one to them. They were larger than the usual size.

The plaintiff recalled John R. Parks, who testified substantially as follows:

JOHN R. PARKS.

The discovery vein of the St. Louis is a gold-bearing fissure vein running in the general direction of the side lines. The vein is developed both northerly and southerly from the Transcontinental tunnel. There are levels running on the vein about 250 feet below the Transcontinental tunnel. It has a dip of about 80° to the east. The Transcontinental tunnel follows a fissure, and there is a fault of the lode caused by that fissure which causes a throw of the vein of about 95 feet.

The Drumlummon vein crosses the east boundary of the St. Louis at the 520 plane. I cannot place the foot-wall at the present; it is not shown on the map, and I have forgotten the exact point. I believe the cut developed it, but I cannot recollect the exact point. Going southerly along the 85-foot level we are just under the hanging-wall of the Drumlummon and in the bratticed vein matter until we come to cut No. 14. At cut No. 14 we have a section across the whole vein which can readily be determined on the hill. The walls of the Drumlummon go down at an angle of about 60°. There is a cross-cut at point 4 on the 85-foot level showing the vein at
69 that point to be about 21 feet wide. The hanging-wall departs at the 108-foot plane from the St. Louis ground and into the compromise ground.

Whereupon the witness was asked the following question:

Q. Have you done anything in the way of measuring up what was taken out by the Montana company?

Whereupon the defendant objected to any testimony relative to ores extracted between the 108 and the 133-foot planes. Defendant argued in support of its objection that between said points the plaintiff did not have the entire apex, that if granted extralaterial rights between said points, it would be taking the ore from the vein on its strike and beyond the vertical side line of the plaintiff's ground, and for the reason that it would take about 186 square feet of the surface of defendant's claim.

But the Court overruled said objection and permitted the witness to answer said question.

To which ruling of the Court the defendant then and there duly excepted.

A. I have, Mr. Keerly and myself made a careful survey of the ground and accurately measured all of the stopes and cavities from which ore had been removed. I sampled carefully in the presence of people appointed by the Montana company to go with me. I took samples of all these stopes. After taking the samples I tendered to them a choice of either portion, and they were received by
70 them. I have assayed those samples carefully in duplicate and I have determined the specific gravity of the mineral removed by taking specimens of that removed at the nearest point; a great number of specimens, calculated the number of tons, the number of cubic feet it takes to make a ton, and from the tonnage and the values I have determined with a considerable degree of accuracy, as correctly as can be determined, the tonnage and the value of the ore extracted. I arrived at the value by samples of ore taken at the nearest points to the cavities stoped out, knowing that the ore originally followed these cavities, and assaying the samples. I calculated the value of the gold at twenty dollars an ounce, which is the rate paid by the smelters, the true value being $2.67 as paid by the Government, and I took the value for the silver at sixty cents an ounce, which was the average price of silver during that time. In making the survey I was obliged to make an arbitrary division of some of the stopes for the reason that we could not determine how much of the ground we would be allowed to show damages for, and consequently in some of the stoped ground I passed an imaginary plane through the stopes, the 108-foot plane, and then divided the balance up with reference to the east and the west side lines of the compromise ground. I called the results of this arbitrary division blocks, which are numbered as we happened to survey and block them out.

71 We followed the plan-s as far south as the 133-foot plane and to the depth of the 190-foot level in defendant's ground. I divided the ground into eleven blocks.

Whereupon the witness was required to take the blocks and tell the tonnage and value he found in each block.

To which said question the defendant objected for the reason that

it included blocks in the compromise ground which by the judgment in the specific performance case was found to be the property of the defendant, together with all of the mineral therein contained. And because they are not within the recovery period under the pleadings in this action, in that a portion thereof at least is taken out since September 16th, 1893. Defendant also specially objected to all proof of quantities and values of any and all ores in each block respectively lying between the 108 and 133-foot planes and south of the Montana company's apex shaft, because no recovery for any ore there extracted is permissible under the pleadings in this case.

But the Court overruled each and every such objection and permitted the witness to answer said questions.

To which respective rulings of the Court the defendant then and there duly excepted.

The witness answered:

A. I have a block No. 1, the stope south of the north line of the Montana company's apex shaft to the 133-foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the compromise ground extended downward vertically.

72 The block has an average width of 7 feet, is 21 feet long and 36 feet high, giving a volume of 5333.1 cubic feet, or 410½ tons. The average value of this ore was $145.00 per ton, or a total of $59,522.50.

Block number 2 is the stope between the instrument at K. and the spud at J. J was 13.5 feet vertically below K. It is from the north side of the Montana company's apex shaft south to the 133-foot plane. The average width of the block is 5.4 feet, its height is 3½ feet, and its length 21 feet, giving a cubical contents of 1814.4 cubic feet. Dividing that by 13, the number of cubic feet to the ton, we have 139.6 tons. The value of the ore as sampled on the north side of this block was $146.42 per ton, which gives the value of the ore removed $20,440.23.

The next block, number 3, is the ore removed between stations J to the floor at H between the 108 and the 133-foot planes, and east of the west of the side line of the 30-foot strip. The height is 66.9 feet, the ground removed is 5 x 7 feet, which gives 2341½ cubic feet or 180.1 tons. The value of the ore from the side of the shaft throughout this distance is $203.88 per ton, making a total value of the ore removed $36,718.78.

Block number 4 is the stope above the 20-foot level, east of the west line of the 30-foot strip. It is south of the 108-foot plane and north of the Montana company's apex shaft.

By agreement of counsel the objections interposed and the

73 exception taken with reference to block one was to extend to blocks two and three and all subsequent blocks in the Compromise ground.

Block 4 is 6 feet wide, 14 feet high, and 6 feet long. It contains 514 cubic feet, or 38.8 tons. A sample of the ore was taken from the shaft, which gave $165.10 per ton, making a value of $6,405.88.

Block 5 is a stope along the 190-foot level, between the 108 and the

133-foot planes east of the west line of the 30-foot strip. It has an average width of 8.4 feet wide, is 8 feet high, and 36 feet long, giving a cubical contents of 2419.2 cubic feet or 186.1 tons. The value of the ore was $127.14. Total value of the ore removed was $23,660.75.

Block 6 is a triangular stope above the 190-foot level between the 108 and the 133-foot planes and east of the west side line of the strip. The length of the stope is 26 feet, average height, 71 feet, average width stoped out, 8 feet. It has a cubical contents of 7753.2 cubic feet or 596.4 tons. The value at $127.14 per ton is $75,826.30.

Block 7 is a little stope which connects the main stope of the 190-foot level with the 40-foot level between the 108 and the 133-foot planes, and east of the west side line of the 30-foot strip. It has an average width of 8.4 feet. Its cubical contents is 2356.2 feet or 181.2 tons, at a value of 127.14; total value of the ore removed is $23,037.77.

Block 8 is the ground stoped out by the Montana company at the south end of the St. Louis' 85-foot level. It is outlined on the
74 map and lies east of the west side line of the compromise strip, and north of the 108-foot plane. This is the ore that was stoped by injunction. The average height of this stope is 15.3 feet, the average width is 6.5 feet, the average height is 22 feet. It contains 2187.9 cubic feet, or 168.3 tons. The value of the ore is $13.28 per ton, total value of the ore removed, $2,235.02. I have excluded a portion of this block as the ore was too low grade.

Block 9 is the stope above the 20-foot level and north of the 108-foot plane. That stope was 6 feet wide, 14 feet high, and 9.5 feet long. It contains 798 cubic feet or 61.4 tons. It has a value of 165.10 per ton, same as block number 4, of a total value of $10,137.14.

Block 10 is on the 190-foot level north of the 108-foot plane. That block has a width of 8 feet and a length of 35 feet and a height of 8 feet. It contains 1904 cubic feet, or 146.5 tons. The value of the ore is $127.14 per ton; giving a gross value of $18,626.01.

I find the total number of cubic feet mined is 27,414.5 or 2118.9 tons, the total value of which is $276,610.38.

Cross-examination:

I took samples from the north side of the Montana company's apex shaft, and I combined the samples from four different points. The shaft is about five feet by seven feet, the long way being northerly and southerly. The samples were taken between the lagging and the shaft, except for block 8; in that case a wagon sheet was spread
75 down and a sample was taken from the top of the block and from its sides. The sample I took in block 2 assayed $146.42. I took it by reaching in between the lagging. My samples for blocks 5, 6, 7 and 10 combined samples taken from the north side of the Montana company's apex shaft. The combined sample averaged $127.14. I took no sample nor made any assay from blocks 5, 6, 7 and 10 for the reason that the ore had been stoped out of the blocks, when my samples were taken. These four blocks, 5, 6, 7 and 10, I estimated to be of the value of $141,150.83. In making my aver-

age, I took the value of block 1, $145.00; block 2, $146.42; block 3, $203.88; block 8 $13.28.

Redirect:

There is a block of ground between the 108 and 133-foot planes and above the 190-foot level that is not included in the stopes or blocks which I surveyed and about which I have testified. The superficial area of such block is 1855½ square feet. Assuming that the ground contained an ore body of an average thickness of 7.29 feet the cubical contents of that ore would be 13,526.63 cubic feet.

Q. And how many tons at 13 per ton?

By Mr. WALLACE: What is the purpose of that?

By Mr. BROWN: We want to show what is in it. It might not be redirect, but I want to put it in any way. It was brought out by them.

By Mr. WALLACE: We object to the question, first: Because
76 it assumes a fact not in evidence, that the area in question contained ore. Second, on the ground that it is immaterial and irrelevant in that the tonnage of this area can cut no figure, since there is no place that embraces any part of stoped territory.

Objection overruled.

Defendant excepts.

A. This would represent 1040.51 tons, taking 13 cubic feet for a ton. Calculating the value of the ore at $127.14, the ore body would have a value of $132,290.44. The average thickness measured horizontally of the ore bodies in the surrounding blocks is 7.29 feet.

Thereupon the plaintiff offered in evidence the original location notice of the St. Louis claim, which was admitted and is as follows, to wit:

Declaratory Statement of Discovery of and Claim to Quartz Lode Mining Claim.

St. Louis Lode Mining Claim, Ottawa Mining (Claim) District, Lewis and Clarke County, Montana Territory:

The undersigned, who is a citizen of the United States, hereby declares and gives notice to all persons concerned, that he has discovered a vein or lode within the limits of the claim hereby located, and that he has this 28th day of September, A. D. 1878, located and do- hereby locate and claim under and by virtue of the laws of the United States and of the Territory of Montana, a mining claim upon said lode or vein to be designated and named the St. Louis Quartz Lode Mining Claim, extending along said vein or lode eight
77 hundred feet in a northeasterly direction, and seven hundred feet in a southwesterly direction, from the center of discovery shaft, where a similar notice is posted, and three hundred feet on each side from the middle or center of the said lode or vein at the surface, comprising in all fifteen hundred feet in length along said lode or vein, and six hundred feet in width, with all the rights and

privileges as to surface ground and lode veins, or lodes within the boundaries of said claim and otherwise and the metals, minerals, and valuable deposits of every kind contained in said veins, lodes or ledges, or within said boundaries which are given or allowed by the laws of the United States aforesaid or of the Territory of Montana.

The mining claim hereby located is situated in Ottawa mining district, Lewis and Clarke County, Montana Territory. Said discovery shaft is about 900 feet in a southwesterly direction from a point of rocks rising about 15 feet above ground and upon the southwestern portion of the Drumlummon mining claim, and about 1,500 feet easterly of Ottawa Gulch in above written county and territory. The adjoining claim is the Drumlummon on the northeast. This location is distinctly marked on the ground so that its boundaries can be readily tracted by a stake set at discovery shaft this 28th day of September, A. D. 1878. And by substantial posts at each corner of the claim and the exterior boundaries of the claim as marked by said posts are as follows, to wit:

Beginning at a post set at discovery shaft, marked A, thence running in a northeasterly direction eight hundred feet to a post
78 marked B, thence northwesterly 300 feet to a post marked D, thence southwesterly 1,500 feet to a post marked E, thence southeasterly three hundred feet to a post marked F, thence same course three hundred feet to a post marked G, thence northeasterly 1,500 feet to a post marked C, thence three hundred feet northwesterly to post B. The undersigned intend- to hold this claim under and according to the laws of the United States and of the Territory of Montana, and to record this notice and statement under oath in the County Recorder's office of said county, as provided by law. Dated this twenty-eighth day of September A. D. 1878.

CHARLES MAYGER. [SEAL.]

TERRITORY OF MONTANA, *Deer Lodge County, ss:*

The undersigned being first duly sworn on oath says that he is of lawful age, a citizen of the United States; that the foregoing notice by him subscribed is a true copy of the original notice of location of the claim above described as posted at the discovery shaft thereon on the day therein stated and that the matters in the foregoing notice contained are true of his own knowledge.

CHARLES MAYGER.

Subscribed and sworn to before me on this, the 10th day of October, A. D. 1878.

J. B. WILCOX,
Justice of the Peace.

79 Filed for record, October 12, 1878, at 9 o'cl'k, A. M.

O. B. TOTTEN,
County Recorder.

St. Louis Patent.

The plaintiff thereupon offered in evidence its patent for the St. Louis Mining Claim, which was received in evidence, and marked as an exhibit, said patent is dated on the 22d day of July, 1887, and conveys the said St. Louis claim to plaintiff's grantor, Charles Mayger, describing the said claim by metes and bounds as in the complaint herein, which patent, among other things, contains the following proviso, to wit:

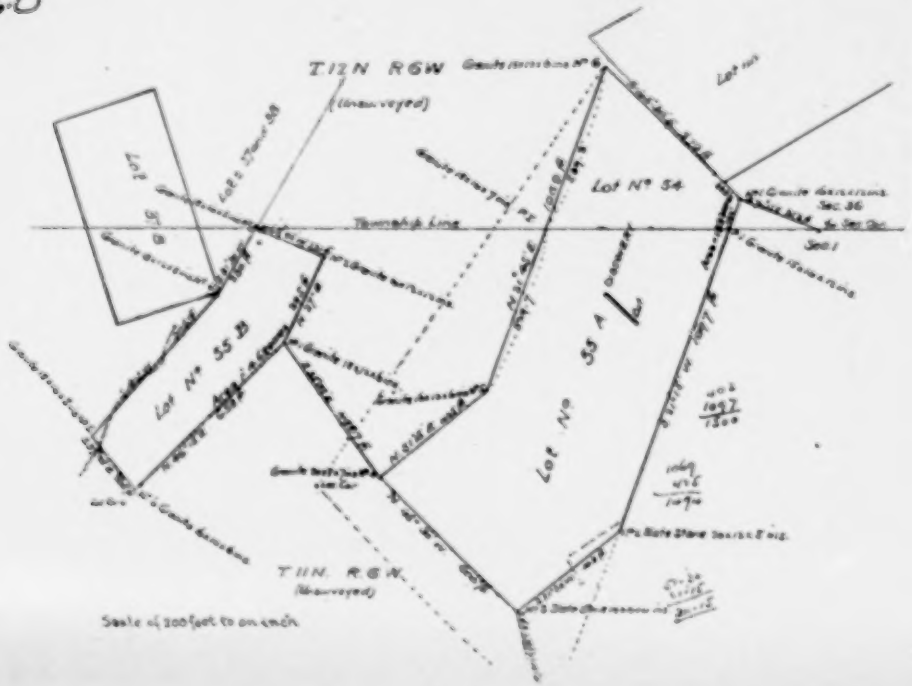
"Provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lots Nos. 54 and 55 A, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes or ledges; and, provided further, that nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another."

Whereupon it is ordered by the Court that the patent itself be ordered attached to this bill of exceptions and sent up to the Circuit Court of Appeals as part of this record, in accordance with the rules of court.

The said patent was dated on the 22d day of July, 1887, and contained the diagram of the St. Louis Lode Mining Claim as therein conveyed, which said diagram is herein reproduced as follows:

(Here follows diagram marked p. 80.)

No. 402
Montana Co. } p. 80
St. Louis Co.



81 *Judgment-roll in Specific Performance Case.*

The plaintiff then read in evidence the complaint, the answer, the replication, the findings of fact and conclusions of law and the judgment rendered in the case of the Montana Mining Company, Limited, *vs.* The St. Louis Mining and Milling Company of Montana, as the same appeared of record in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis and Clarke, and commonly known as the Specific Performance case. Said documents, omitting captions and titles, are as follows, to wit:

In the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis and Clarke.

MONTANA MINING COMPANY, LIMITED, Plaintiff,
vs.
CHARLES MAYGER and THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant-.

Complaint.

The plaintiff complains of the above-named defendants and for cause of action alleges.

82 I.

That this plaintiff is an incorporation duly organized and existing by and under the laws of the Kingdom of Great Britain, and is doing and entitled to do business in the State of Montana by virtue of its compliance with the laws of this State regulating foreign corporations.

That the above-named defendant, the St. Louis Mining and Milling Company of Montana, is and was at the several dates hereinafter mentioned likewise an incorporation organized and existing by and under the laws of said State of Montana.

II.

And plaintiff further shows and alleges that on and prior to the 7th day of March A. D., 1884, plaintiff's predecessors in interest, to wit, one William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy, who were then and there all citizens of the United States and duly qualified mineral land claimants, were the owners of, in possession of, and lawfully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground, comprising a portion of the Nine Hour Lode Mining Claim situate, lying and being in Ottawa (unorganized) Mining District, in the County of Lewis and Clarke, and State of Montana, more particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour Lode bears south 39 degrees 32 minutes
83 east, said course being at right angles to the boundary line of the St. Louis Lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east, on a line parallel to the aforesaid boundary line of the St. Louis Lode Claim, between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode Claim between corners one and two; thence 20 degrees and 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 408 feet to corner No. 3 of the St. Louis Lode; thence north 46 degrees 10 minutes west along the line of boundary of said St. Louis Lode Claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees 28 minutes east along a line parallel to the boundary line of the St. Louis Lode Claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained; that theretofore in causing to be surveyed for a patent his St. Louis Lode Mining Claim, the above-named defendant Charles Mayger, had wrongfully extended, and caused to be extended, the easterly boundary line of his said mining claim over the premises so above-mentioned and particularly described, which said premises were then, and ever since the twenty-sixth day of July, 1880, have been, a part of the Nine Hour Lode Mining Claim, so that the property of the aforesaid predecessors in interest of this plaintiff, and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual
84 possession and entitled to the possession thereof. And thereupon said defendant Charles Mayger, having wrongfully made application in the United States Land Office at Helena, Montana, to enter said premises as a part and portion of his said St. Louis Mining Claim, the said Robinson and Huggins duly made and filed in said land office a protest and adverse claim thereto, and thereafter and within the time allowed by law for such purpose, they commenced an action in the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis and Clarke, to determine the right to the possession of the said premises. In the said action so commenced as aforesaid, the said William Robinson and James Huggins were plaintiffs, and the above-named defendant, Charles Mayger, was defendant therein, and the said court had jurisdiction to determine the subject matter of said action; that thereupon, and on the seventh day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode Mining Claim and the said St. Louis Lode Mining Claim, the said defendant, Charles Mayger, made, executed and delivered to said Robinson, Huggins and Sterling a certain bond for a deed in writing, whereby, in consideration of the compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim in the said land office, so that he might procure a United States patent, he thereby covenanted and agreed

that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling, or
85 their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns, a good and sufficient deed of and for all the premises so above particularly mentioned and described, a copy of which said bond for a deed is hereunto annexed marked Exhibit "A" and hereby made a part of this complaint.

III.

And plaintiff further shows and states that thereupon the said Robinson and Huggins dismissed their said suit in said District Court, withdrew their said adverse claim in said land office, and duly performed on their part all of the terms and conditions of said contract to be by them kept and performed, that the said Charles Mayger thereupon proceeded with his application to enter said St. Louis Lode Mining Claim, and thereafter a United States patent was duly issued to him for said St. Louis Lode Mining Claim as surveyed, and included therein that portion of the Nine Hour Lode Mining Claim above particularly mentioned and described, but no notice was given to this plaintiff or any of its predecessors in interest of the issuance of said patent, until on or about the — day of November, 1899. That upon the execution of said bond for a deed the said predecessors in interest of this plaintiff were in possession of the premises above mentioned and described, and they and their successors in interest ever since have been and yet are in the possession thereof, holding, using and enjoying the same as a part and portion of said Nine Hour Lode Mining Claim.

86 IV.

And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode Mining Claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode Mining Claim; that being so the owner of said mining claim, and being so entitled to a conveyance of the portion thereof above particularly mentioned and described, this plaintiff, on or about the — day of July, A. D. 1893, demanded of and from the said defendants that they make, execute and deliver a good and sufficient deed to it of and for the premises above mentioned and described in compliance with the terms and conditions of the said bond, no demand for the execution of said deed having been previously made by plaintiff or any of its predecessors in interest; but the said defendants then and there refused and ever since have neglected and refused to make, execute or deliver said deed, though often requested so to do.

V.

And plaintiff further shows and states that not only has the said defendant, Charles Mayger, refused and declined to comply

with the reasonable request of the plaintiff that he make and execute to it a deed for the said premises above particularly described, as in and by his said bond for a deed he covenanted and agreed to do, but on or about the tenth day of June, A. D. 1893,
87 for an alleged consideration of one thousand dollars, he made, executed and delivered a deed of and for said premises to the said defendant, the St. Louis Mining and Milling Company of Montana, but plaintiff avers that at the date of the execution of said deed, the said defendant, the St. Louis Mining and Milling Company of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said co-defendant and of the rights and equities of plaintiff thereunder as being the successors in interest of the said Robinson, Huggins, Sterling and its other grantors.

And plaintiff further alleges that the said defendants have conspired and confederated together for the purpose of cheating, wronging and defrauding this plaintiff out of the said premises, and to that end the said defendant and the St. Louis Mining and Milling Company of Montana have instituted a number of suits in the Circuit Court of the United States within and for the District of Montana, in which it claims that it is the owner of the premises above particularly described by virtue of the deed so wrongfully and fraudulently made, executed and delivered to it by its said codefendant, as aforesaid, and in which said actions it claims the right to recover large sums of money for ores therein alleged to have been wrongfully mined from said premises by this plaintiff; that in order to successfully defend itself against said suits and in order to remove the cloud from plaintiff's title to said premises caused by the execution of the said deed to the said defendants, the St. Louis Mining and Milling Company of Montana, it is necessary
88 that the said defendants should be compelled to make, execute and deliver to this plaintiff a deed for the said premises, as in equity and good conscience they ought to do.

Wherefore, the premises considered, plaintiff prays that by the proper order or decree of this Court the said defendants be adjudged and decreed to make, execute, and deliver to plaintiff a good and sufficient deed for the said premises above mentioned and described, and that in the event of their failure so to do the decree of this Honorable Court may have the force and effect of such deed; that plaintiff may have such other and further relief as may be in accordance with equity and good conscience, and that it have judgment for its costs.

M. KIRKPATRICK AND
CULLEN & TOOLE,
Plaintiff's Attorneys.

Duly verified by Jos. K. Toole, as attorney, on September 5th, 1894, before W. E. Cullen, Jr., notary public, Lewis and Clarke County, Montana.

EXHIBIT "A."

Deed—Mayger to Robinson et al.

Know all men by these presents, that I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars, for the payment of which well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with my seal and dated this 7th day of March, A. D. 1884.

89 The consideration of this obligation is such that, whereas, a certain cause now pending in the District Court of the Third Judicial District, Lewis and Clarke County, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States Land Office at Helena, Montana.

Now, then, in consideration thereof, and the further consideration of one dollar to the said Charles Mayger in hand paid by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in the United States Land Office at Helena, Montana, for a patent to the St. Louis Lode Claim described therein and situated in Lewis and Clarke County, Montana Territory, and procure as soon as practicable a government patent therefor, and when such title shall have been procured according to said application said Charles Mayger hereby covenants, promises and agrees, upon the demand of the said William Robinson and James Huggins and Frank P. Sterling, or their heirs or assigns, to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situated in Lewis & Clarke County, Montana Territory, and comprising a part of two certain quartz lode mining claims known

90 as the St. Louis Lode Claim and the Nine Hour Lode Claim, and particularly described as follows, to wit: Commencing at a point from which the center of the discovery shaft of the Nine Hour Lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis Lode, between corners 2 and 3, 50 feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the said St. Louis Lode Claim and the Nine Hour Lode Claim, and to a point on the boundary line of the St. Louis Lode, between corners 1 and 2; thence south 20 degrees 28 minutes east along said boundary line between corners 1 and 2, 605 feet to corner No. 2 of the St. Louis Lode, 40.031 feet to corner No. 3 of the St. Louis Lode; thence north

46 degrees 10 minutes west along the line of boundary of St. Louis Lode, between corners 3 and 4, 30 feet to a point; then north 50 degrees 28 minutes east along the line parallel to the boundary line of the St. Louis Lode, between corners 2 and 3, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral therein contained; and if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement provided and intended, then this bond and agreement to be null and void; otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL.]

91 The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL.]

Witness:
J. K. TOOLE.

Duly acknowledged. Filed and recorded March 8th, 1884, at 3 A. M.

[Title of Court, Title of Cause.]

Answer.

And now come the defendants herein and for answer to the complaint of plaintiff:

I.

Admit that the said William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy were at the time mentioned in said complaint citizens of the United States and duly qualified mineral claimants, but on their information and belief deny that they were or are the predecessors in interest of said plaintiff, or that they were the owners or possessors of the piece, tract or parcel of land in said complaint described, or in the possession or entitled to the possession thereof, or any mineral therein then or at any other time, or that the same was or is a part of the Nine Hour Lode Claim, and aver that the same was and is a part of the St. Louis Lode Mining Claim, designated and known as such, and embraced and included in the United States patent obtained by the said defendant, Charles Mayger, for said St. Louis Lode Mining Claim, as hereinafter set forth.

92 Deny that defendant, Charles Mayger, wrongfully or otherwise extended or caused to be extended the easterly boundary line of said St. Louis Mining Claim, over the said described premises or any part thereof, but admit that he caused a survey to be made of the same, and aver that the boundary lines of said St. Louis Mining Claim as originally located included and embraced the said

locus in quo and every part thereof at and prior to the location of said Nine Hour Lode Claim, and that the said Charles Mayger and his successors in interest ha*th* ever since been, and now are, in the possession of the same and entitled thereto, save and except a small strip thereof occupied by a portion of the ore-house of plaintiff by sufferance of defendants.

And on their information and belief deny that said Charles Mayger wrongfully made application in the United States Land Office to enter said premises, and aver that the same was and at all times had been a part and portion of the said St. Louis Mining Claim.

Admit that the adverse claim of Robinson and Huggins was interposed to said application, and that they instituted an action, as in said complaint mentioned, and that said agreement was entered into, but deny that it was for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode Mining Claim and said St. Louis Lode Mining Claim, and aver that the same was executed to the said Robinson, Huggins and Sterling as a compromise on account of their adverse claim and suit aforesaid, and comprised a part of said St. Louis Lode Claim
93 owned and possessed by the said Charles Mayger, and to enable him to obtain a patent for the whole thereof according to said survey, and agreed to convey the same as in said bond set forth.

Defendants admit that by the terms of said bond the said Charles Mayger agreed, after obtaining a patent therefor, on demand of said Robinson, Huggins and Sterling, to make to them, their heirs or assigns, a good and sufficient deed for the premises in said complaint described, and on their information and belief aver that said plaintiff never has acquired or succeeded to the right, title or interest of said Robinson, Huggins or Sterling to said premises or any thereof, by conveyance or otherwise.

Deny that said Exhibit "A," as set forth, is a copy of the said bond, in that it obligates the said Charles Mayger to make a good and sufficient deed to said Robinson alone, and avers the fact to be the said original bond obligated said Charles Mayger to execute a deed on demand to the said Robinson, Huggins and Sterling, their heirs or assigns, as expressly set forth and alleged in said complaint.

II.

Admit that the said Charles Mayger obtained a patent for said St. Louis Lode Mining Claim, but deny that it contained any portion of said Nine Hour Lode Mining Claim, and aver that the said plaintiff and predecessors in interest had full knowledge and notice of the issuance of said patent mentioned, and were well aware and apprised thereof at or about the date of the issuance of the same.

94 Deny that at the time of the execution of the said bond, or at any other time, the said plaintiff or its predecessors in interest were, or ever have been, in possession of said premises, or any part thereof, except the small portion aforesaid, or that they

or either of them used or enjoyed the same, or any part except the small part aforesaid, or that they ever had, held or enjoyed any part thereof as a part of said Nine Hour Lode Mining Claim.

III.

Admit that the said plaintiff, by mesne conveyances, acquired the title to said Nine Hour Lode Mining Claim, but deny that the said conveyances or any conveyances to plaintiff embraced or included the premises in said complaint mentioned and described, or any part or portion thereof.

Admit that the said plaintiff demanded of defendants a deed to said premises, as set forth in said complaint, but deny that no demand therefor was ever theretofore made, and aver the facts to be as hereinafter stated.

IV.

Deny that the said defendants, or either of them, had any knowledge or notice that the said plaintiff was the successor in interest of said Robinson, Huggins and Sterling, or either of them at the time of the making of the deed by the said defendant Mayger to his said codefendant, and on their information and belief deny that the said plaintiff is the successor in interest of said Robinson,
95 Huggins and Sterling, or either of them, in said premises so embraced in said Mayger's survey and patent, or any part thereof.

Deny that defendants have combined or confederated together for the purpose of cheating, wronging, or defrauding plaintiff out of its right or title to said premises or any part thereof, and aver, as heretofore, that the plaintiff has not and never had any right or title to said premises, or any part thereof, as successor in interest to any one whomsoever.

Deny that the claim of defendants, or either of them, casts any cloud upon any title of plaintiff, or that it is necessary they, or either of them, should execute a deed to plaintiff for said premises, or any part thereof, to satisfy the requirements of equity, or for any other cause or reason, and aver that if the said conveyances to plaintiff for said Nine Hour Lode Mining Claim included said premises as alleged no such transfer or conveyance is necessary for any purpose.

And these defendants, for further answer to the complaint of plaintiff, show unto this Honorable Court that the said adverse claim aforesaid was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to said St. Louis Mining Claim, and that the said bond was executed as a compromise to avoid the same; all of which was done contrary to equity and good conscience, and for the sole purpose aforesaid.

That on the twenty-second day of July, 1887, the said Charles Mayger, grantor of his codefendant, obtained and procured a United States patent for the premises described in his complaint as a
96 part and portion of his St. Louis Mining Claim in accordance with his possession and the survey had thereof, on account

of which he acquired the legal title thereto, and had and held the possession thereof.

That the said defendant, the St. Louis Mining and Milling Company of Montana, ascertaining and learning that the said conveyances to said plaintiff did not comprise the said premises described in plaintiff's complaint, and that it had and held no title thereto, and for the purposes of better securing the possessory title by it had and held, obtained and received the deed from said Charles Mayger mentioned and described in plaintiff's complaint.

And these defendants, for further answer to the complaint of the plaintiff, and in pursuance of section 105, Code of Civil Procedure, Compiled Statutes of Montana, allege generally that the cause of action set forth in plaintiff's complaint is barred by the provisions of sections 29, 30, 31 and 32, subsec. 2, section 41 and section 47 of said Code of Civil Procedure, and had been so barred at the time of the execution of said deed to said defendant company.

Wherefore, defendants pray this Hon[illegible] Court that if it shall appear the said plaintiff is not the ov[illegible]id premises by any of the conveyances mentioned in the s[illegible]plaint, or the title by it so pleaded, that the same be decreed [illegible]nd void, and that the right, title and claim of defendant company be decreed superior to the claim of plaintiff in the premises in controversy; that such other and further relief may be had as in equity and good conscience
97 they or either of them may seem entitled, and that they receive their costs and disbursements in this behalf expended.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

Duly verified.
Filed January 2, 1895.

[Title of Court. Title of Cause.]

Replication.

Now comes the plaintiff, and replying to the new matter in the answer of defendants filed herein:

I. Denies that the premises particularly mentioned and described in the complaint herein are or ever were any part of the St. Louis Mining Claim in any other way or manner or at all, except that the same were by the agreement aforesaid to be embraced in the application of the said Charles Mayger for a patent, as in the complaint herein mentioned and set forth.

II. Denies that the boundary lines of the St. Louis Mining Claim as originally located included or embraced the *locus in quo* or any part or portion thereof, and denies that the said Charles Mayger or his successors in interest are now or have ever been in the possession of the same or entitled thereto or any part or portion thereof.

III. Denies that the said original bond obligated the said Charles

Mayger to execute a deed on demand to the said Robinson,
98 Huggins and Sterling, but, on the contrary, avers that the copy of said bond attached to the complaint herein is a true copy thereof.

IV. Denies that the said adverse claim mentioned in the complaint herein was interposed for the purpose of harassing or delaying the said Mayger from obtaining a patent to his said St. Louis Lode Mining Claim, and denies that there was anything in or about the execution and delivery of the said bond contrary to equity or good conscience.

V. Plaintiff denies that the said defendant, the St. Louis Mining and Milling Company of Montana, ever had or held a possessory title to the premises in the complaint herein particularly mentioned and described, or that it obtained or received a deed from said Charles Mayger for the better securing of any such title.

VI. Denies that the cause of action set forth in plaintiff's complaint is barred by the provisions of secs. 29, 30, 31, and 32, subsec. 2, sec. 41 and sec. 47 of the Code of Civil Procedure of the State of Montana, or any or either thereof or at all.

Wherefore plaintiff prays judgment as in its complaint herein.

M. KIRKPATRICK,
CULLEN & TOOLE,
Attorneys for Plaintiff.

Duly verified.

99 *Findings of Fact by the Court.*

I.

That the plaintiff and the defendant, the St. Louis Mining and Milling Company of Montana, are and each of them were, at the date of the commencement of this action, corporations doing business in the State of Montana.

II.

That on the seventh day of March, A. D. 1884, William Robinson, James Huggins, F. P. Sterling, Warren De Camp and John W. Eddy were the owners of, in possession and entitled to the possession of all and singular the Nine Hour Lode Mining Claim, situate, lying and being in the Ottawa (unorganized) Mining District, in the county of Lewis & Clarke, State of Montana, and that the strip of ground called the "compromise ground" which is the subject of dispute in this action, was, at that time, and thereafter continued to be, a part of said Nine Hour Lode Mining Claim.

III.

That prior to the date last aforesaid the said Charles F. Mayger had made application in the United States Land Office at Helena, Montana, for a patent to the said St. Louis Lode Mining Claim, and had included in his application the said ground which is the subject of dispute in this action, and that thereupon the said Robinson and

Huggins had made and filed in the said land office a protest and adverse claim to the ground in dispute, and an action had
100 been instituted within the statutory time to determine the right to the possession of said premises in dispute, and as to who had the right to obtain patent therefor; which said action at said last aforesaid date was pending in the District Court of the Third Judicial District of Montana, within and for the County of Lewis & Clarke; that on the said seventh day of March, A. D. 1884; the said Robinson, Huggins and Sterling and the defendant, Charles F. Mayger, entered into the bond or obligation attached to the complaint herein, marked exhibit "A," and that said obligation or bond was made and given for the purpose of settling and determining the action aforesaid and the controversies involved therein, and for the purpose of determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim owned by the said Mayger, the boundaries of which claims were in conflict aforesaid.

IV.

That thereupon said suit was dismissed and the said adverse claim was withdrawn in said land office, the said Robinson, Huggins and Sterling performing on their part all of the terms and conditions of said contract to be by them performed.

V.

That at the date of the execution of the said bond, the said Robinson, Huggins and Sterling, Eddy and De Camp were in the
101 actual possession of the said compromise strip, and that they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of their said Nine Hour Lode Mining Claim.

VI.

That at the date of the execution and delivery of said bond it was expressly agreed between the parties hereto that all of the ground lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour Lode Mining Claim.

VII.

That the plaintiff herein is the successor in interest of the said Robinson, Huggins and Sterling, the obligators named in said bond, and it is also the successor in interest of Warren De Camp and John W. Eddy, who were cotenants with said obligees in said premises at the date of the execution of said bond.

VIII.

That the conveyances introduced in evidence on the part of the plaintiff embrace and were intended to include the said compromise ground, and conveyed to the respective grantees therein named all

the interest, legal and equitable, which the said grantor or grantors had in said premises at the date of the execution thereof, and it was the intention of the parties to the deeds to convey as well their interests in said compromise strip as every other part and parcel of the said Nine Hour Lode Mining Claim.

102 IX.

That on or about the — day of July, A. D. 1893, the said plaintiff, as the assignee of the said Robinson, Huggins and Sterling, duly demanded a deed of said compromise strip of ground of and from said defendant, but the said defendant refused to execute such deed, and that no demand for such deed had ever previously been made upon the said Charles F. Mayger by the said plaintiff or any of its predecessors in interest.

X.

That on or about the tenth day of June, A. D. 1893, the defendant, Charles F. Mayger, assumed to convey the said compromise strip to his codefendant, the St. Louis Mining and Milling Company of Montana, but at the date of said conveyance, the said defendant, the St. Louis Mining and Milling Company of Montana, had full notice and knowledge of the equities of the plaintiff in and to said compromise strip and its possession thereof.

XI.

That the defendants wrongfully assert title to the ground in controversy, and thereby cloud the title and estate of plaintiff therein, and that plaintiff has a right to have such cloud removed from its title to the premises in controversy.

XII.

That the Court finds all of the issues raised by the pleadings in this case in favor of the plaintiff and against the defendants.

103 *Conclusions of Law.*

I.

The plaintiff is entitled to a conveyance from the said defendant of and for the premises particularly mentioned and described in the said bond, known as the "compromise ground."

II.

That the said defendants, and each of them, should be enjoined and perpetually restrained from asserting any right, title, or interest of any kind or character in or to the said compromise ground, or any part or portion thereof, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

Dated June 1, 1895.

HORACE R. BUCK, *Judge.*

[Title of Court, Title of Cause.]

Judgment.

This cause came regularly on to be tried on the tenth day of May, A. D. 1895, Charles J. Hughes, Jr., Mr. Kirkpatrick, and Cullen & Toole appearing for the plaintiff, and Messrs. W. W. Dixon, Toole & Wallace and McConnell, Clayberg & Gunn, appearing for the defendants. A jury having been expressly waived by the parties the issues raised by the pleadings herein were tried to the court sitting without a jury, and after the introduction of testimony on the part of the plaintiff and on the part of the said defendants, and the
104 argument of counsel, and after due deliberation, the Court having made and filed on the first day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner of the equitable and entitled to the conveyance from the defendants of the legal title to the premises mentioned in the complaint and hereinafter described.

Now, therefore, on motion of counsel for plaintiff, it is ordered, adjudged and decreed that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, be specifically performed, and that the defendant the St. Louis Mining and Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to the said plaintiff a good and sufficient conveyance in fee simple absolute, free from all encumbrances, of and for the premises mentioned in the complaint and hereinafter described. The said conveyance shall be in form like the one hereunto annexed, and, upon the failure of said defendant within the time aforesaid so to make, execute, and deliver such conveyance, then the clerk of this court is hereby appointed a commissioner, who, in the name of and for and on behalf of the said defendant, the St. Louis Mining and Milling Company of Montana, is hereby directed to execute a deed to said plaintiff for said premises, which, after reciting that it is so executed by said clerk as such commissioner for and on behalf of said defendant, shall be in form substantially like the one hereto attached and approved, and,
105 upon recording a duly certified copy of this decree, and of the said deed so executed by the said commissioner, in the office of the county recorder of the county of Lewis and Clarke, and State of Montana, the same shall have the force and effect of a conveyance of the said title from the said defendants to the said plaintiff; that the said defendants and all persons claiming under them or either of them be forever barred from all interest or claim to the said premises, or to any part or portion thereof, or to the possession of the same or any thereof.

The premises affected by this decree and so to be conveyed are more specifically bounded and described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the Nine Hour Lode bears south 39 degrees and 32 minutes east; said course being at right angles to the boundary line of the St.

Louis Lode, between corners two and three, fifty feet distant; thence north 50 degrees, 28 minutes east on a line parallel to the aforesaid boundary line of the St Louis Lode Claim, between corners two and three, two hundred and twenty-six (226) feet to a point on the boundary line of the St. Louis Lode Claim, between corners one and two; thence south 20 degrees, 28 minutes west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis Lode; thence north 46 degrees, 10 minutes west along the line of boundary of said St. Louis Claim, between corners three and four, thirty feet distant to a point; thence north 50 degrees, 28 minutes east along a line parallel to the boundary line of the St. Louis Lode Claim, between
106 corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained.

It is further ordered and adjudged that the plaintiff do have and recover from the said defendant its costs in this behalf sustained, taxed at the sum of one hundred fifty-five and 30/100 dollars.

And that the plaintiff have execution therefor, June 1, 1895.

HORACE R. BUCK, *Judge.*

STATE OF MONTANA, *County of Lewis & Clarke, ss:*

I hereby certify that the foregoing is a full, true, correct and compared copy of original complaint, answer, findings of fact by the court and judgment in case No. 2834 Montana Mining Co. Ltd. *vs.* Charles Mayger, *et al.*

In witness whereof, I have hereunto set my hand and seal this 1st day of June, 1905.

[SEAL.] SIDNEY MILLER, *Clerk,*
By R. C. CLEMENTS,
Deputy Clerk.

Complaints in Other Suits.

Plaintiff then offered in evidence the complaint in case No. 3214 pending in the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis and
107 Clarke, in which suit the defendant herein is plaintiff and the plaintiff herein is defendant, such suit was commenced on the 10th day of June, A. D. 1895, to recover the sum of $45,000 damages against the plaintiff herein for mining, taking, carrying away and conveying to its own use 224 tons of ore, such ore having been so mined by plaintiff within the surface boundaries, extended downward vertically, of the compromise ground. Said complaint was so offered and read in evidence as an admission on the part of the defendant as to the value of the ore in the compromise ground.

Plaintiff then offered and read in evidence a complaint in an action commenced in the state court by the defendant in this action against the plaintiff in this action to recover possession of certain ore or its value taken out of the ground in controversy north of the

108-foot plane and above the 40-foot level in which it was alleged that the amount of ore was 8 tons and the value of the ore was $1,600.00.

Defense.

Mr. W. E. Cullen, one of the attorneys for the defendant, thereupon made the opening statement for the defendant to the jury. In such opening statement Mr. Cullen stated that it was admitted by the defendant that the foot-wall of the Drumlummon vein crossed the west side line of the compromise strip approximately at its intersection with the 133-foot plane. (Plaintiff's amendment.)

The defendant to maintain the issues on its part called and had sworn as a witness in its behalf, one John H. Farmer, who testified substantially as follows, to wit:

108 JOHN H. FARMER.

I am a civil and mining engineer, I made a survey of the surface boundaries of the St. Louis and Nine Hour Claims about June 10th, 1905. I made a map of the two claims from this survey. The red mark on this map shown running parallel with the easterly boundary line of the St. Louis, and across the compromise ground is intended to represent the apex of the Drumlummon lode. It crosses the west line of the compromise ground at an angle of 31° 41′. It is 10.6 feet from the center of the discovery shaft on the Nine Hour to the nearest point of the east boundary line of the compromise ground.

And thereupon the witness was asked the following question:

Q. Drawing a line at right angles to that one (indicating the east line of the compromise ground) 50 feet from the center of the discovery shaft, on the Nine Hour, where would it bring it to on the map? That is from the center of the discovery shaft on the Nine Hour and at right angles to the line between corners 2 and 3 on the St. Louis?

To which question the plaintiff objected for the reason that the same was immaterial and irrelevant.

Which objection was sustained by the Court, and the witness was not permitted to answer the same.

To which ruling of the Court the defendant then and there duly excepted.

And thereupon the defendant's map was marked Exhibit "E" and introduced in evidence.

109 The Court in passing upon the last above objection said:

After examination of the pleadings and exhibits attached and reading such authorities that have been cited, I hold that the objections interposed by plaintiff are well-founded.

The way for the Court is clearly pointed out in the decision of the Circuit Court of Appeals in the 102 Federal, page 430. The judges there considered among other things that at the time of applying for a

patent the locators of the St. Louis included in their survey a portion of the premises which were claimed by the owners of the Nine Hour, and that the latter made an adverse claim and brought an action; that this suit was compromised by an agreement that as soon as patent was obtained by the St. Louis, the owners thereof would convey back to the owners of the Nine Hour the 30-foot strip "together with all minerals therein contained," that the owners of the St. Louis obtained patent but refused to make the conveyance; that suit was brought "for the purpose of settling and agreeing upon the boundary lines between the said Nine Hour Lode Mining Claim and the said St. Louis Mining Claim"; and that after a favorable result to the Montana Mining Company, the St. Louis Company conveyed the 30-foot strip "together with all minerals, etc., therein contained."

The Court interpreted the conveyance in question, having regard to its terms and the subject matter involved and the surrounding circumstances, in order to ascertain the intention of the par-
110 ties. The subject matter involved was mining ground. The surrounding circumstances were that a controversy had arisen, the application for patent, the adverse claim, the action thereon, the compromise, the agreement, the suit for specific performance. The decision of the Court was that by the compromise, the St. Louis Company admitted that the claim of the Nine Hour people, that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory, was correct; that is to say that the surface lines as claimed by the Nine Hour in the compromise were correct, and that the strip of land contracted to be conveyed was a portion of the Nine Hour Claim. The Court considered the antecedent circumstances referred to, leading up to and culminating in the deed, holding that they were properly to be considered in determining what was the intent of the parties to the contract. These antecedent circumstances are all part of the transaction which culminated in the deed, which finally executed the intent of the parties, as such intent had theretofore clearly expressed in the contract itself. There is no ambiguity in the contract and deed, and extrinsic evidence other than the writings themselves is not material.

The adverse claim, the action brought, settled, compromised and dismissed, the agreement made to convey the 30-foot strip, "together with all minerals therein contained," the suit for specific performance of the covenant, according to its terms, the decree made by the District Court of the State ordering specific performance of the
111 covenant, describing the property by metes and bounds, "together with all the minerals therein contained," and the deed made in pursuance of the decree, describing the property in the same terms, clearly expressed the whole transaction. There is no duty left to the Court to perform except to give legal effect to what the parties have expressly intended.

As indicated, this is not difficult in view of the decision of the Appellate Court, for it is expressly laid down that the use of the words "together with all the minerals therein contained" inserted in the contract and in the deed are not more inclusive or more significant

than the words universally employed in grants of mining claims, "together with dips, spurs, angles, and also all the metals, ores, etc., therein"; and that in the absence of terms in the contract and in the conveyance, clear and explicit, manifesting an intention on the part of the St. Louis people to surrender the whole of their contention concerning the true location of the boundary lines, and also to divest its claim of its extralateral rights, which had not been in litigation, and which had not been assailed by the owners of the adjoining claim, the use of the words "together with all the minerals therein contained" was not sufficient. The Court entertained no doubt that it was the purpose of the contracting parties to fix a boundary line between the two mining claims, reserving to each the rights that would have attached, if the boundary line had been settled without controversy. They state their latter proposition after con-
112 sideration "of all the circumstances"; that is to say, of the particular circumstances adduced that there had been litigation over this mining property, a contract, compromise and deed, the court expressly adding, "and the language of the contract and of the deed sustains that conclusion."

My belief is that the deed was executed having reference to the Acts of Congress, and that the words of the deed did not include the minerals in that portion of the vein apexing outside of the compromise strip and having their apexes within the boundary of the St. Louis claim. The title held by the parties to the covenant and the title they acquired by the patent was just a title as was created and authorized by the laws of the United States to a quartz claim as distinguished from a title to land at common law, and the phrase "together with all minerals therein contained," when applied to the estate and premises held by the parties under the acts of Congress is to be regarded with relation to such laws of the United States and should not be given the effect it would have at common law.

The pleadings and the exhibits referred to and made part of the pleadings satisfy me that the parties to the covenant contracted with reference to such statutory rights as each held or might acquire to a quartz mining claim, and that it was the intention to restore the compromise strip to the Nine Hour Lode claim so that it might be held intact as part of the Nine Hour claim, possessing just
113 such rights as it would have had if no claim had been made to it by the St. Louis Claim.

The metes and bonds in the description were necessary in describing the premises, and the conveyance was for the sole purpose of locating the surface and veins apexing within it; hence the phrase used in the deed will be limited to the estate and premises conveyed and the minerals therein contained, as defined by the statutes of the United States.

A careful reading of the opinion of the Circuit Court of Appeals shows that they regarded the instrument as one to convey back to the owners of the Nine Hour claim the 30-foot strip, and that execution of the deed was a restoration of the strip to the Nine Hour claim, of which it was always a part. This being so, its status is as if there had never been any trust relationship created, and as if it had never

been patented as part of the St. Louis claim. Therefore, I must sustain the objection introduced by the plaintiff to this testimony. The defendant can make its offer in writing and the record will be kept clear.

I did not make the survey for the adverse claim filed by the owners of the Nine Hour Claim against the application to enter the St. Louis, but I resurveyed the lines of the adverse strip as shown by the records in the land office. The area in conflict was one acre and ninety-eight hundredths.

The witness here produced another map made by himself and testified:

114 This map shows the St. Louis claim and all the workings on the St. Louis as shown on plaintiff's map, and in addition it represents the continuation of the level under the 65-foot shaft. I made a survey of the level from the bottom of the 65-foot shaft northeasterly, and it is correctly platted on this map. If continued in the same direction, the apex of the St. Louis lode would cross the east boundary line of the St. Louis claim about 508 feet north of corner No. 2. The lead at the face of this drift is dipping slightly to the west. (The map referred to was marked Exhibit "G" and introduced in evidence.)

Witness continuing: This is a map showing a longitudinal section through the Drumlummon vein at the top of the Montana Company's apex shaft. It represents the apex shaft, the west boundary line of the compromise ground. It also shows the 190-foot level, the 18-foot level, the 46-foot level, the 85-foot level, and the raise connecting the 190-foot level with the 85-foot level. It also shows the several blocks of ground claimed to have been extracted by the defendant as shown by the testimony of Mr. Parks. I put on these blocks after Mr. Parks' testimony was given for the plaintiff. Blocks 6 and 7 are not put onto the map, because I could not locate them from the testimony.

The defendant upon the Court's ruling that no extrinsic evidence would be considered to interpret or explain the language in the bond of March 7, 1884, offers to call to the witness stand the following witnesses, and to examine them on matters of extrinsic facts calculated to disclose the situation of the parties at the time the bond was executed, and the situation of the property, to wit, John Langan, William Robinson, Warren De Camp, F. P. Sterling, John W. Eddy and Joseph K. Toole.

115

The Court refused to permit the witnesses to be called to the stand and required the defendant to submit the facts in the form of an offer of proof, to which ruling of the Court the defendant then and there excepted, the Court basing its ruling upon the decision of the Supreme Court of the United States in Scotland Co. *vs.* Hill, 112 U. S. 183.

And thereupon the defendant offered to prove the following facts by the witness, John H. Farmer:

That he has seen the complaint in the adverse claim suit of the Nine Hour against the St. Louis, referred to in the complaint in the

specific performance case, and knows the description therein contained; that it represents an area of 1.98 acres, and that he has platted that description upon the map, Exhibit "E"; that it includes the 30-foot strip so called. That that area also carries the apex of the Drumlummon vein for a distance of several hundred feet, north of the 108-foot plane, as such apex is claimed by the plaintiff in this action, according to the development on its map, Plaintiff's Exhibit No. 1.

By Senator BROWN: Is this offered for the same purpose?

116 By Mr. WALLACE: This proof is offered for the sole and single purpose of showing as extrinsic evidence, the facts and conditions surrounding the property involved, and the parties to the compromise settlement, and for no other purpose whatever, and that 1.98 acres was involved in the adverse claim suit.

The plaintiff objects to any testimony for the purpose offered and as irrelevant and immaterial, and trying to put in extrinsic evidence, and not proper, and I add to the objection that so far as in I shall hereafter move to strike it out.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit such facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness Farmer, the defendant then and there and at the time duly excepts.

The defendant then offered to prove by the witness, William Robinson, present in court, that he was the person who located the Nine Hour claim, and the one who represented his co-owner Warren De Camp at the settlement of said adverse claim suit, which was made in Helena, and that he was a plaintiff in that suit. That the whole area in conflict in that suit was 1.98 acres, the boundaries being as shown upon the Farmer map, Defendant's Exhibit "E," and that all this strip described in the bond was the easterly thirty feet of said 1.98 acres.

117 That in regard to the situation of the parties at the time of the compromise settlement, the plaintiffs in the adverse suit, the owners of the Nine Hour, had a discovery at the Nine Hour shaft, which was then at the points shown on Plaintiff's Exhibit No. 1, on the Drumlummon lode; that that shaft was distant ten and one-half feet from the surveyed side line, and the patented side line of the St. Louis; that ore had been discovered at depth, and in the Drumlummon vein in that shaft. That they knew that the vein dipped to the easterly, and its apex lay for many hundred feet to the north of the Nine Hour shaft inside of the adverse claim area aforesaid. That there were no other apexes or known veins cropping out in the thirty-foot strip; that there were no actual survey marks or boundary lines claimed by either plaintiffs or defendants in the adverse claim suit to have been along the line represented by the west side line of the compromise strip. That the instructions this witness had from his co-owner, De Camp, with reference to the settlement, were that he was to surrender any portion of the surface so that he retained the rights to the ore beneath that had been all discovered in the Nine Hour

shaft; that he acted for De Camp at the settlement upon these instructions, and that he and his co-owners in the Nine Hour knew that they could not claim minerals at their discovery and in the Drumlummon vein, unless they secured themselves against
118 the apex rights, either by holding the apex and the surface in which it appeared, or by getting a conveyance of the mineral in the vein so apexing in the adverse area. That one of the co-owners of the Nine Hour was Judge F. P. Sterling, and also that the whole matter was all talked over when arrangement was made, and it was considered with William Mayger personally in Helena, who represented the defendant, Charles Mayger, and it was the distinct understanding that they were to have, in consideration of their giving up the ground outside of the 30-foot strip, and of the apex that lay without it all the ores and the quartz rock that lay under the compromise strip surface, regardless of where the apex of the vein in which they lay might be. Mayger asked that Messrs. Toole and Toole, who were then his lawyers, should draw the settlement agreement. This was acquiesced in. Afterward the instrument now shown witness, being the original bond here offered in evidence, was brought down to Sterling's office, and he was told by Mayger that the present Governor, Joseph K. Toole, had drawn it. That he had confidence in him, and was uncertain on two points, first, whether Mayger could pay the fifteen hundred dollars named in that instrument and refuse to deed the thirty-foot strip, and second, whether the instrument would give them the mineral-bearing rock within the thirty-foot strip, and under its surface, regardless of the apex. That he went up to Governor Toole himself, with the instrument, and asked him directly about each of these questions, and was assured by him that they would have to make the deed, and
119 that this instrument as drawn covered not only the surface, but gave them all the minerals underneath the surface, without regard to where the veins in which they lay might apex. Because of this assurance, and for no other reason, they accepted the instrument in question in settlement of the suit, and he and his co-plaintiffs dismissed the adverse claim suit.

As to the situation of the property, he would further say that the west side line of the Nine Hour, from the time it was located until the time it was patented, never was in any manner changed, and that the side line is the westerly line of the conflict area of 1.98 acres described in the adverse; that when the Nine Hour was originally located, the parallel single straight east side line of the St. Louis ran to the southeast corner stake of said claim, on the ground, which was planted twenty-five feet westerly of the said Nine Hour west side line, and the east side line of the St. Louis, as then located, of twenty-five feet on the south end, and fifty feet on the north end; that after he had made the discovery at depth in the Nine Hour shaft, it was known generally, and many people came up and tried to locate, and that shortly thereafter a new stake appeared away up in the Nine Hour surface. It was on the undisturbed country, never had been there before, and made the south end line of the St. Louis one thousand feet long. It included his Nine Hour discovery shaft, and

all of the adverse area and very much more beside. When
120 the St. Louis surveyed for patent they started their east survey line down toward that stake, but when they got to a point within a short distance north of his Nine Hour shaft, they stopped at corner No. 2, put up a monument that had never been there before, and bent to the southwesterly, running an angular side line to their corner No. 3, all as shown on plaintiff's map, Exhibit No. 1, as to corners No. 2 and 3.

Plaintiff objected to it for the same reasons, and for the additional reasons that it tends to set aside solid deeds, records and decrees, by hearsay testimony, and by the imaginary thought of Mr. Robinson, as he recollects twenty years ago.

By the COURT: I will sustain the objection.

To which ruling the defendant duly excepted. This exception by consent of Court was deemed to apply to the Court's refusal as to each separate fact offered to be proven by the witness De Camp, and separate exceptions being to be taken as to each separate fact.

The defendant then offered to prove by the witness Warren De Camp, the following facts:

That he was a co-owner in the same adverse claim suit, and a co-owner in the Nine Hour very shortly after its location. He knew the settlement that was made of the adverse claim suit, and that he directed William Robinson to represent him in that settlement, which was had in Helena, he being at Marysville, and his instructions to Robinson were as stated in the offer of proof in the case of the
121 witness, Robinson, and the reasons for giving the said instructions were as therein stated. That this witness knew that the Nine Hour location west side line had never been changed; that it was the west side line of the adverse area in said adverse suit, and that as it was originally located there was a clear space between the east side line of the St. Louis, which was straight, single and without a turn or angle, of 25 feet to the south end and 50 feet on the north end. That he knew the southeast corner so marked of the St. Louis claim, as located, and that it was 25 feet at the nearest point from that stake to the Nine Hour west side line. That Robinson made a discovery of ore through a shaft at what is now marked Nine Hour shaft, on Plaintiff's Exhibit No. 1, and that that ore was in the Drumlummon vein, and that it was known that it apexed westward of the compromise strip, but within the adverse area, and that the adverse area carried the apex northward for several hundred feet, from the Nine Hour shaft, and for several hundred feet beyond the 108-foot plane. That other people had tried to come up and locate on the hill; that the vein dipped to the easterly. That after this discovery the stake that had been marked "southeast corner stake" of the St. Louis before was newly shaved and appeared with a mark on it "S center stake of St. Louis," and a new stake appeared way to the eastward in the Nine Hour claim, itself marked "Southeast corner of St. Louis claim," making the south end line of that claim one thousand feet about in length, and including between that last-
122 named state and corner No. 1 of the St. Louis, the greater portion of the Nine Hour surface, and practically all of the

adverse ground and the Nine Hour shaft where Robinson had made his discovery. That in the following summer the survey for patent of the St. Louis was had, and they ran their east side line from corner No. 1 down toward this new southeast corner stake, but stopped at corner No. 2, where they placed a survey monument and where no mark had even been before, and then they ran the line 2-3 as shown on Plaintiff's Exhibit No. 1. That witness was willing to surrender a portion of the surface of the adverse in order to be secured in the minerals and ores at depth where the Robinson discovery was, and in that vein, and he so instructed the witness William Robinson in that regard.

Plaintiff objected to it for the same reasons heretofore stated, for the reason that whatever previous transaction was had, whatever thoughts or talks were had between this witness and Robinson and anybody else, the contract merged in the decree and is long since settled.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts or any of them to be proved, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the
123 witness De Camp, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness Frank P. Sterling that he was a co-owner in the Nine Hour at the time of the adverse claim suit and the settlement; that he was a lawyer and that he understood the rule as to apex rights; that he was advised of the situation on the ground as detailed by the offer of proof in the case of the witness- De Camp and Robinson as between the St. Louis and the Nine Hour Claim, and as to the discovery of ore by his co-owner Robinson in the Nine Hour shaft and the dip of that vein. That Robinson was present when the settlement negotiations were carried on and concluded in his office; that they transpired largely between William Mayger, who represented the defendant and his brother, Charles Mayger, and this witness; that the question of the adjustment was discussed between William Mayger and himself, and it was finally determined that the Nine Hour owners would give up the excess ground covered in the adverse if a sufficient area should be awarded the Nine Hour people, north of the Nine Hour shaft to protect them in the substantial enjoyment of the mineral that they had discovered in that shaft, which was the Drumlummon vein; and that this amount was agreed upon at fifty feet, but by some error in the actual description as contained in the agreement, to wit, the bond drawn by Governor Toole only covered forty and a fraction feet. That in consideration of this surrender of the surface
124 and the apex right within the surrendered portion of the adverse area the defendant Mayger was to and did forego all claim to any mineral lying beneath the surface af the compromise strip and its vertical plane without regard to where that mineral or the rock containing it might apex. William Mayger asked that Messrs. Toole and Toole, his attorneys, should draw the settle-

ment instrument; this was acquiesced in and it was drawn by Governor Joseph K. Toole. When it was brought down for consideration, Robinson brought up the question of whether the fifteen hundred dollars named in the bond could be paid instead of giving a deed, and also the question as to whether the language as to minerals in the description covered the point desired, so as to include any minerals of any kind found beneath that surface, and he insisted on going to Gov. Toole with the instrument to talk it over. After he came back the instrument was sent to Marysville to be signed by Charles Mayger, and when it was returned, signed and acknowledged, we dismissed the adverse claim suit. We never would have accepted this less area of ground, or dismissed the adverse claim suit, except for the fact that we *were* preserved the minerals in the vein that we had discovered from the point of discovery on its dip to the eastward, and it was distinctly agreed between the parties to said bond that all such minerals should be and remain the property of the obligees therein named, and to their assigns.

Plaintiff objected to it for all the reasons stated in the
125 offer as to Farmer, Robinson and De Camp, and all the other witnesses, and for the further reason it expressly appeared that this witness, whatever the talk and understanding was, was merged in the bond and must speak for itself.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven and to the refusal to permit each and every single one of said offered facts to be proven by the witness Sterling, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness John W. Eddy that he was a co-owner in the claim at the time of the settlement, and that he was a lawyer, and further offers to prove substantially the same facts as set forth in the offer of proof as to the witness Sterling, except that Sterling and not Eddy conducted the negotiations with William Mayger, but Eddy was present.

Same objection.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, and to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the wit-
126 ness Eddy, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness John Langan that he had lived in Marysville always from the time of the location of the original Drumlummon and before the location of the St. Louis down to the present time. That he knew Cruse mountain thoroughly; that he heard of the William Robinson discovery in the Nine Hour on what is the Drumlummon vein at the Nine Hour shaft, as marked upon Plaintiff's Exhibit No. 1, and that immediately thereafter he went upon the ground intending to make a location; that the surface was cleaned then of all obstructions, rocks or

brush, and any stakes in the vicinity on the south end could be readily seen. That he found the southeast corner stake so marked of the St. Louis claim; that he knew the west side line of the Nine Hour and its boundaries and knew where the stakes were, and that the line from the northeast corner of the St. Louis to the southeast corner stake as it then was on the ground passed 25 feet to the westward of the west side line of the Nine Hour at the south end of the St. Louis, and fifty feet to the westward at the northwest corner of the Nine Hour. That in the following year this stake was freshly blazed, viz., the southeast corner stake of St. Louis and marked "S end center stake of St. Louis," and that a new stake many feet to the eastward appeared in ground where
127 it never had been before, marked "Southeast corner stake of St. Louis" and opposite the point that the survey line 1-2, on Plaintiff's Exhibit No. 1, the map, if continued in this direction, would have reached it, making the south end line of the St. Louis then about one thousand feet long. That there was no monument or mark of any kind at the survey corner No. 2 on the east side line of the St. Louis, as shown on Plaintiff's Exhibit No. 1, until the following summer, when the survey for patent of the St. Louis was made, when that monument was first put up, and the same is true of the survey corner No. 3. That this witness has no interest whatever in this controversy and is in no manner related in business or otherwise connected with any of the parties concerned.

Plaintiff made the same objection to it and all of these other offers connected with these witnesses; they are all applicable to this offer.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness Langan, the defendant then and there and at the time duly excepted.

The defendant offers to prove by the witness- Robinson and De Camp that prior to the change in the southeast corner stake
128 of the St. Louis claim there was no stake whatever standing within the boundaries of the Nine Hour Claim as stated. That after the stake marked southeast corner St. Louis had been moved up onto the Nine Hour ground they went together and removing the stones found piled around said stake, found the grass of 1881 green and growing under there.

Same objection as to Robinson.

By the COURT: I will sustain the objection.

The Court having refused to permit such facts or any of them to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witnesses Robinson and De Camp, the defendant then and there and at the time duly excepted.

The defendant offered to prove by the witness J. K. Toole that while he had no distinct recollection of drawing the bond for a deed which is exhibit "A" attached to the answer, he recognizes the same

as being drawn by him, and that he is able to say that the words "together with all the minerals therein contained" were inserted therein because he was informed at the time the bond was drawn that it was the agreement of the parties, obligor and obligee therein named.

Plaintiff objected to it as entirely irrelevant and immaterial.

By the COURT: I will sustain the objection.

The Court having refused to permit these facts, or any of
129 then to be proven, upon objection of the plaintiff, to the refusal to permit said facts to be proven, and to the refusal to permit each and every single one of said offered facts to be proven by the witness Joseph K. Toole, the defendant then and there and at the time duly excepted.

The defendant at this time and as a part of the proof explanatory of the bond contract and the phraseology therein contained at the close of the metes and bounds description, as follows, "together with the minerals therein contained," offers in evidence the original bond from Charles Mayger to William Robinson, acknowledged March 7th 1884, and recorded March 8th, 1884, on page 325 of book 4 of Miscellaneous records of Lewis and Clarke County, Montana, for the purpose of showing that the same is a pen and ink writing and all, save the acknowledgment, in the handwriting of J. K. Toole, who witnesses the instrument.

Plaintiff objected because the bond in itself is immaterial; because it is made a part of the answer in this case and therefore it is unnecessary and not only conceded in this case, but was the basis of a former suit.

By the COURT: I will sustain the objection.

To which ruling of the Court the defendant then and there duly excepted.

The defendant then offered in evidence the complaint, the original complaint, and the replication in case No. 2798, old series,
130 William Robinson, *et al. vs.* Charles F. Mayger, being the adverse claim suit referred to in the record, in the specific performance case put in evidence by the plaintiff as a part of its case, for the purpose of showing that the area involved was the 1.98 acres testified to as shown upon Defendant's Exhibit "E" by the witness John H. Farmer.

To which plaintiff objected as being immaterial.

Such objection was sustained by the Court and the defendant then and there duly excepted. And said complaint did describe as the area involved, the said 1.98 acres.

The defendant called and had sworn as a witness for the defense one Samuel E. Bowlby, who testified substantially as follows:

SAMUEL E. BOWLBY.

I live at Marysville, Montana, and I am in the employ of the Montana Mining Company, Limited. I have been in the employ of this company for 11 years. I was one of the bookkeepers from the year 1894 until September, '99. My title was store-keeper, but

I was assistant accountant. The books which I have produced here are the company's books kept in the regular course and conduct of its business. I first produced what is known as the revenue book. This book is the monthly sheets, it is a complete record of the cost of mining and milling and of all expenses connected with the company from the first to the last of the month inclusive. Here
131 is the stock ledger, another of the company's books. It is marked "Ledger of the Montana Mining Company, Limited," and it covers the period represented by the monthly sheets that I have spoken of, to wit, November 1, 1898, to May 1, 1899. This book is the invoice book, it is marked "Invoice from December, 1897, to April, 1899." It is one of the regular business books of the company kept as such during that period. This book marked "Cash Montana Mining Company, Limited," is the only cash book kept, except petty cash during the periods referred to. This abstract, Defendant's Exhibit "J," is a tabulated statement of the contents of the books. I am familiar with it. I have checked the first column marked "A" with the revenue sheet, the figures are the result developed under that head. Column "B" I checked against the revenue sheet and found it correct, so also with columns L, M, N, O, P, Q and R, they are correct.

Whereupon the company's books were offered and received in evidence, as also was Defendant's Exhibit "J."

Defendant called and had sworn as a witness in its behalf, one Albert E. Gregory, who testified as follows:

ALBERT E. GREGORY.

I am 25 years old. I live in Marysville, Montana. I am the bookkeeper for the Montana Mining Company, Limited, and
132 have been such bookkeeper for three and a half years. I have examined this abstract, Defendant's Exhibit "J." It came from the business account books of the company and from the bullion books and other books identified by Mr. Bowlby. I have checked column "C" with the books and found it correct, as also column D, E, F, G, H, I, J, K, T, U, V, W and X.

Whereupon defendant offered in evidence "Abstract J" which was received in evidence over plaintiff's objection. Such abstract is as follows, to wit:

(Here follows table marked p. 133.)

Date	a Tons to 50 mill m. d.	b Mining and Milling per ton m. m.	c Cash from bullion	d Cash from Concentrates	e Total Cash c + d	f 50 stamp assay value	g 20 stamp assay value	h Tailings per ton from 50 mill
1898								
Nov.	3470	£ 5 7s	£ 23993 58	£ 2702 20	£ 26696 88	£ 5.39	£ 13.25	£ 2.79
Dec.	3616	5 2s	24826 67	2411 38	27275 05	5.01	15.18	3.22
1899								
Jan.	3646	5 11	27355 45	1753 23	29108 68	4.86	13.22	2.79
Feb.	3400	6 01	30950 34	2438 39	33388 73	4.80	17.45	3.75
Mch.	3686	4 17	19975 79	2874 95	22850 74	5.43	14.57	3.09
Apl	3590	6 60	28263 98	5187 97	33451 95	5 60	17 80	3.47
	21408	£ 5.57	£ 165565 81	£ 17406 12	£ 182971 93 c/a = 87%		£ 14 44	£ 3.02

c/a = 670 ? 680 ton Say c/a = 81%

i	j	k	l	m	n	o	p	q ¶	r	s t	u	v	w	x
per cent recovered per battery $\frac{h}{g}$	Average per ton $\frac{n}{a}$	Per cent cash recovery $\frac{s}{n}$	60 - mill tons	50+60 Mill total tons a+b	Total cost mining & Milling	50 Mill cost per ton	60 Mill cost per ton	Total milling costs	50 Mill total cost of milling	Tons in 20 side $\frac{2}{5}$ of a	Tons in 30 side $\frac{3}{5}$ of a	20 stamp bullion contents t x g	30 stamp bullion contents w x f	Total 50 mill bullion contents y + w
67.33	$ 8.54	90.10	3580	7050	$ 40396.70	$ 2.09	$ 0.95	$ 10657.49	$ 7267.60	1388.0	2082.0	$ 18391.00	$ 11,238.63	$ 29,629.63
64.54	9.08	83.09	3659	7275	38,067.18	2.01	.74	9959.91	7276.56	1446.4	2169.6	24,956.35	10,869.70	32,826.05
66.00	8.20	97.98	3600	7246	37,795.91	1.98	.81	10,135.10	7216.42	1458.4	2187.6	19,280.05	10631.74	29,911.79
65.00	7.86	87.52	2730	6130	36,860.36	1.94	1.02	9,372.06	6586.32	1360.0	2040.0	16932.00	9,792.00	26,724.00
66.08	9.08	68.23	3200	6886	32,531.33	1.90	.96	10,077.46	7019.27	1474.4	2211.6	21,482.01	12008.99	33491.00
66.93	10.50	88.71	3100	6690	43442.51	2.24	1.11	11,487.28	8040.65	1436.0	2154.0	25,560.80	12,148.56	37,709.36
66.00	$ 8.88	85.60	19869	41277	$ 230093.99	$ 2.03		$ 61,689.30	$ 43406.82	8563.2	12844.8	$ 123607.21	$ 66,689.62	$ 190,291.83

$\frac{m}{m}$ = 4.08 · mining and [illegible]
$\frac{\text{cost}}{611}$ = 2.03 · milling " "

Depts Ex J

134 & 135 Defendant also called and had sworn one Thomas Lahiff.

THOMAS LAHIFF.

I live in Marysville, Montana. I have been mining for 17 years. I worked in the Drumlummon mine commencing in '89, and continuously until last February or March. I accompanied Professor Parks on the 20th day of July, 1899, when he was sampling the Nine Hour apex shaft. He took six samples, five of them in the apex shaft, and one in the 85-foot level. I kept a memorandum at the time. At the first point he took two sacks, this was 18 or 20 feet below the surface. Number 2, he took three sacks. Number 4, he took one sack. Number 5, he took one sack. Number 6, the 85-foot level, about 35 pounds. I think the first three samples were all taken over the 20-foot level. The sampling was not fairly done. It was what might be called a picked sample. He took too much of the bright stuff, the richest ore, letting the balance go.

GEORGE H. BURLEY, witness on behalf of the defendant, being first duly sworn, testified as follows, to wit:

GEORGE H. BURLEY.

My name is George H. Burley. I am 38 years of age. I have lived in Marysville, Montana, for 12 years. I have been engaged in mining for 24 years, in quartz mining 17 years. I know the Drumlummon vein and am familiar with its ores. Last
133 Saturday we went down below the top of the Montana Company's apex shaft, a distance of about 20 feet of the collar. We cut cribbing at that point and drove in a drift in the north end. We ran in 8 feet in copper stained quartz in place. In running the 8 feet, we ran downward, so that at the end the drift was about 2 feet lower than the point where we started in the apex shaft.

Defendant also called and had sworn as a witness in its behalf one CHARLES W. GOODALE, who testified substantially as follows, to wit:

CHARLES W. GOODALE.

I am 50 years of age and am a mining engineer. I have lived in Montana for 20 years. I graduated from the institute of Technology in Boston in 1875, and have been continuously engaged in the practice of my profession ever since. I have known the Drumlummon vein or mine since 1893. I was consulting engineer for the Montana Mining Company, Limited, the defendant, from 1893 to 1898. I am familiar with the manner in which the business books of the company are kept, and with the method of keeping mining accounts in general use in this state and elsewhere. I am familyiar with the methods pursued by the Montana Mining Company, Limited, the defendant herein, in keeping its accounts and from such it is easy to determine the cost of mining and milling the ores,

and the amount or value of the product. I have made an
137 examination of the defendant company's books to determine the cost of mining ore as mined by them from December 1, 1898, until May 1, 1899, and I have an abstract made in part by myself of such books for that period. The books I used are here in court. The abstract is Defendant's Exhibit "J." The defendant has two quartz-mills known as the 50 and 60-stamp mills. The part of their mills used for ores carrying silver, was the 20-stamp side of their 50-stamp mill. The cost of mining and delivering the ore to the mill was $4.08, the cost of milling per ton during that period was $2.03. The cost of mining and milling as given included all development work, salaries of officers of the Montana Company, taxes, insurance and hay and oats for the stock. Eliminating these last-mentioned items the cost of mining and milling would be approximately $5.00 per ton. The saving as shown by the books was 85.6% in bullion and concentrates of the battery, which was a good recovery.

The 46-foot level represents about the richest part of the ore body taken vertically. Block 10 is below the good ore area. The 190-foot level or about 100 feet of it was run while I was with the company as its consulting engineer. The ore in block 10 is very low grade, so low that for the last 20 feet of it at least, it would not pay for mining and milling. There would be no difficulty in getting a sample from the back of block 10 in the 190-foot level. Blocks 4 and 9 are still in the ground. In 1899, prior to the former trial of this case, I visited the ground and I saw
138 high-grade ore above the 18-foot level. I went up to the surface, satisfied myself by examination going up that these blocks remained in the ground. That is the two blocks, the 4 and 9 are substantially the same thing, being divided only by an imaginary line. I went up through the plaintiff's stopes on the north side of the ground from the 20-foot level to the surface and saw the north side of the ore body all the way up.

I have examined the Drumlummon vein in the St. Louis claim. It enters the claim at about the 520-foot plane. No part of the apex passes through the north end line of the St. Louis. I have examined all of the workings of the plaintiff in that vicinity and found no evidence that the Drumlummon vein passes through the end line of the St. Louis.

I have examined the veins in the St. Louis claim. The discovery shaft as marked on the map, Plaintiff's Exhibit No. 1, is to the south of the Transcontinental tunnel, there is a drift and a shaft. I have examined the tunnel very carefully recently, and I also examined it in 1893. The vein carried by the south drift is not the same vein as that carried by the north drift out of the Transcontinental tunnel. Opposite where the north drift enters the Transcontinental tunnel or nearly so, there is a seam which is a possible extension of that vein. No attempt has been made to develop that seam, except with a sample pick just picking into it a little. I have been through the north drift to its face, it measures about 247 feet in length.

139 Cross-examination:

The figures I gave of the cost of mining of $4.08, cover the last two months of '98, and the first four months of '99. I was not operating the mine at that time. I formed my opinion from the figures I found in the books, and the same with reference to the milling of $2.03.

I took the last course running north in the level from the 65-foot shaft, the discovery vein. It was no-th 49° east, magnetic. I have made no complete survey of the 65-foot shaft level. I helped measure the drift out and in the last course of it I noticed it was bearing to the north 49° east as already stated, for something like 35 or 50 feet.

The defendant called and had sworn as a witness in its behalf, one ALEXANDER BURRELL, who testified substantially as follows:

ALEXANDER BURRELL.

I am 54 years old, and I am manager of the defendant company. I know where the 108 and the 133-foot planes are. Such ore as was taken out between those planes was mined between the first day of November, 1898, and about the middle to the 20th day of April, 1899, containing a large amount of silver. It was treated on the 20 side of the 50-stamp mill, which was reserved for
140 this class of ore, being specially fitted for working silver ores.

I have been connected with the defendant company for 17 years.

Cross-examination:

We had at one time what we called our danger line, this was the east line of the compromise ground, and we worked up to that line until we received the deed, after the judgment had been affirmed in the Supreme Court of the United States. Prior to the receipt of the deed, we extracted ores to the easterly and below that line on the dip of the vein. All of the ore which was extracted in the vein south of the Montana company's apex shaft to the 133-foot plane and above the 190-foot level was taken out by the defendant prior to June 1st, 1899.

The defendant called and had sworn as a witness in its behalf one CARLETON H. HAND, who testified as follows:

CARLETON H. HAND.

I am 46 years old. I reside in Butte, but at present am operating in Idaho. I am a mining engineer and assayer and have been engaged in that business since 1880. I know the St. Louis mine at Marysville, and knew it in 1893. In 1893, by the direction of Mr. William Mayger, about the middle of November of that year, I took certain samples in the Nine Hour claim of the defendant and

assayed them myself. Among others I took a sample about 10 feet above the defendant company's 190-foot level, on the
141 north face of the Montana company's stope. The assay of this sample was 1.1 oz. in silver, gold $1.60, or a total of $2.26 per ton. The next sample was No. 9 of the foot-wall streak, it was taken from about 20 or 30 feet above the 190-foot level. The sample taken was across a face of 8 feet. I obtained an assay of it of silver 6.1 oz., gold $10.40, total value per ton $14.06. My next sample was about 10 feet above where I took the sample last-mentioned. It was taken from 4½ feet of the hanging-wall streak at that point. That assayed 12.2 oz. in silver, $12.40 in gold, making a total of $19.72 per ton. I did not take any sample out of the 190-foot level, though I went to the north face of that level. I was looking for ore of value to see what had been extracted from the stopes or from the mine, and the appearance of the level was such that it did not appear to me to have any value, therefore I did not sample it.

Thereupon defendant recalled CHARLES W. GOODALE, who testified substantially as follows:

CHARLES W. GOODALE.

I have seen Defendant's Exhibit "J." I checked columns C, D, E, I, J, K, T, U, V, W and X, and found them correct. The average value of the ore treated during the periods referred to was $14.44. The total expense of the treatment was $7.30 leaving a net balance of $6.48.

142 Defendant likewise called and had sworn one CHARLES A. MOLSON, who testified substantially as follows:

CHARLES A. MOLSON.

That he was 44 years of age; that he was a mining engineer, had followed that profession for 25 years; that he had learned his profession in Montreal, Canada; that he was for two years on the geological survey in Canada and was afterwards with the Pueblo Smelting and Refining Company of Pueblo, Colorado, and with sundry and divers other companies. That he had examined the discovery vein in the St. Louis mining claim, and was familiar with the Transcontinental tunnel and the levels running north and south from it. That he had examined the 65-foot shaft and the levels at the bottom of it.

The vein carried in the south drift from the Transcontinental tunnel is not the same vein as carried in the north drift. The vein in the south drift is cut off by the fissure which is followed in the Transcontinental tunnel. To the eastward of the said drift there is a slate and granite contact, there is at that point a possible movement of 8 or 9 feet indicated, but there has been no throw of 90 feet, there is nothing on the surface to indicate such a throw. The

last 84 or 85 feet of the level in the north drift shows a turn of 10° to 12° northeast, and if the vein continues in the same direction, it would cross the easterly side line of the St. Louis
143 claim near the 520-plane. There is a fissure on the southwesterly or right-hand side of the Transcontinental tunnel as you enter, which may be the continuation of the plaintiff's discovery vein. Where it goes to, I cannot say, as there is no work done on it.

I made an examination of the books of the defendant company that were offered in evidence here in connection with the preparation of Exhibit "J." Exhibit "J" is a correct abstract of what is shown on the books of the company. The value of the ore worked on the 20 side of the 50-stamp mill from November 1st, 1898, to May 1st, 1899, was $14.44 per ton. The cost of mining between the said periods as shown by the company's books was $4.08. The cost of treatment in the mills $2.03, which was reasonable both as to mining and milling.

Defendant also called and had sworn one WILBUR E. SANDERS, who testified substantially as follows:

WILBUR E. SANDERS.

I am a mining engineer. I graduated in 1885 from the Columbia Schools of Mines in New York City, and since graduating I have had about 7 years of experience both working as a practical miner and in my business as mining engineer. I am acquainted with the properties here in controversy and have made a study of them. I examined the surface of the St. Louis mining claim for the
144 purpose of ascertaining the course of its discovery vein. I saw nothing on the surface which indicates the course of the vein. I examined the Transcontinental tunnel. From its entrance in for a distance of about 100 feet it is closely cribbed, and it is in granite and porphyry. The drift on the discovery vein from the Transcontinental tunnel runs to the bottom of the 65-foot shaft in granite. The walls of the vein are very nearly vertical. Where the north drift strikes the Transcontinental tunnel it turns toward the mouth of the tunnel as you go out and there is evidence of drag in that direction. About ten feet from the shoulder of the tunnel there is a vein fissure which goes into the south wall of the Transcontinental tunnel, it is apparent at that point from the drag of the quartz in that direction that there has been a faulting there, not a large one, but from 10 to 12 feet. The vein has been thrown by the Transcontinental fault fissure. The dip of the drift on the discovery vein and that of the fissure showing on the southwest side of the Transcontinental tunnel is practically vertical.

From the bottom of the 65-foot shaft, the course of the vein is north 73° east, and if it continues in that direction it would cross south of the 520-foot plane as shown on plaintiff's map. If the discovery vein from the point at which it is shown in the fissure on the

southwest side of the claim makes as much of a turn to the west as is found in the north end of the vein toward the east, it would cross the west side line of the claim.

145 I can find no evidence that the vein shown in the south drift from the Transcontinental tunnel is the same vein as plaintiff's discovery vein. I was not able to find any drag in the tale in the Transcontinental tunnel which would indicate a throw. Beyond the south drift where the granite meets the slates, there is the same throw as is shown by the discovery vein, and the fissure on the southwest side of the Transcontinental tunnel of which I have already spoken, and the throw as shown by the slate and granite contact, and by the discovery vein and the small fissure, is in the opposite direction to the throw as claimed by the plaintiff for its vein. If there had been a throw of 90 feet, one would expect to find a corresponding throw of the slate and granite contact, and to find it displaced in the same direction to about the same distance.

The defendant called as a witness in its behalf, one Miles Cavanaugh, who being first duly sworn, testified as follows:

MILES CAVANAUGH.

I am 69 years of age. I have mined all my life. A great deal of my mining was quartz. I know the St. Louis and the Nine Hour claims. I went up there to sample a portion of the 190-foot level in the Nine Hour. I got into it through the 85-foot level of the plaintiff. I sampled about 30 feet from the north end of the level. I commenced at the north end and I got down as near as I could get to three inches all around the north end, then I turned and got

146 the same amount by way of crossing the back from the hanging-wall as near as I could get to about five feet. I could not get the foot-wall exactly. I sampled all the way back for about 30 feet. This is 3 or 4 inches was the width of a strip or the thickness of a strip. I spread a canvas and took my samples on that and sacked it as quick as I got it down. I sealed up the sacks and shipped it by express to Helena. Then I got a team and took it to East Helena and delivered it to Mr. Smith of the East Helena Smelter and received a receipt for it.

Which receipt was introduced in evidence, marked Defendant's Exhibit "N," and read to the jury as follows:

DEFENDANT'S EXHIBIT "N."

EAST HELENA, MONT., *June 26th*, 1905.

Received of Miles Cavanaugh 40 sacks of ore, gross weight 2085 pounds.

AMERICAN SMELTING & REFINING CO.,
By F. M. SMITH,
Assistant Manager.

Defendant's Ex "C"

MINE

SHIPPING POINT Marysville

ORE BOUGHT OF Miles Cavanaugh

American Smelting and Refining Co.
EAST HELENA PLANT.

Date Settlement JUN 25 1905 190

ASSAY PER TON			PERCENTAGE		PRICES		DEBIT	CREDIT
GOLD	0.11	Ounces	For 95 Per Cent		120	Per Ounce		2.09
SILVER	1.0	Ounces	For 95 Per Cent		58 3/8	Per Ounce		.56
LEAD		Per Cent	For 90 Per Cent			Per Cwt.		
COPPER		Per Cent	For 100 Per Cent Less 1-8			Per Pound Copy		
SILICA		Per Cent				Excess		
IRON		Per Cent				Excess		
ZINC		Per Cent	Over 10 Per Cent			Excess		
MANGANESE		Per Cent				Freight and Treatment per Ton		
LIME		Per Cent				Totals		2.65
SULPHUR		Per Cent				NET VALUE PER TON		

Serial Number	Our Number	Car Number	Gross Weight	Per Cent Moisture	Number of Sacks	Net Weight	Per Ton	DEBIT	CREDIT
	611				140				
	Mine No. a	Dean	2061	7.2	214	1913		Good Low grade	
							Freight		
							Sampling	10-	
							Totals		
							NET PROCEEDS		

DATE ASSAY June 27 1905.

Handling &

Lot Sinclair CHIEF ASSAYER

A CHARGE OF FIVE DOLLARS MADE FOR SAMPLING ON ALL LOTS OF ORE CONTAINING LESS THAN FIVE TONS. RATES EXCEPT ON CONTRACTS FOR SPECIFIED TIME OR SPECIFIED TONNAGE, SUBJECT TO CHANGE WITHOUT NOTICE.

Please Sign and Return Enclosed Voucher to us Promptly

KEEP THIS STATEMENT

E. H. 13-1-05-10 M

AMERICAN SMELTING AND REFINING CO.

By _____

Quotations used Date Settlement _____ Checked by _____

There would be no material change in the character of the ore that would be found 7 feet below the back of the level from what the ore which I obtained from the back of the level and which made my sample.

Thereupon the defendant offered in evidence the certificate of the American Smelting and Refining Company marked Defendant's Exhibit "O."

(Here follows Certificate marked p. 147.)

148 & 149 Thereupon the defendant recalled Samuel E. Bowlby, who produced the defendant's bulletin book, and who testified as follows:

SAMUEL E. BOWLBY.

During the six and a half months ending June 30th, 1893, there was worked in the defendant's company's mills at Marysville 33,731 tons of ore, making an average yield of $7.27, or total gross yield $287,907.00.

The half year ending 31st of December, 1893; tons 32,553, average yield $9.98, gross yield $324,726.

For half year ending June 30th, 1894; tons 34,613, average yield $12.61, gross yield $63,446.00.

For half year ending 31st of December, 1894; total tons crushed 38,010, average yield $14.18, gross yield $539,148.

For half year ending June 30th, 1895; tons of ore crushed 27,230, average yield per ton $19.98; gross yield $544,061.00.

For half year ending December 31st, 1895, tons of ore crushed 37,790, average yield $13.14, gross yield, $496,662.00.

For half year ending June 30th, 1896; tons of ore crushed 37,180, average yield $10.36, gross yield $385,051.00.

For half year ending December 31, 1896; tons of ore crushed 25,150, average yield $11.20; gross yield $281,723.00.

150 For half year ending June 30th, 1897; tons of ore crushed 6,820, average yield per ton $14.58; gross yield $175,975.00.

For half year ending December 31st, 1897; tons of ore crushed, 37,290; average yield per ton, $9.48; gross yield, $353,620.00.

For half year ending June 30, 1898; tons of ore crushed 38,215; average yield per ton, $7.91; gross yield, $302,317.00.

For half year ending December 30, 1898; tons of ore crushed 40,130; average yield per ton, $7.62; gross yield, $30,598.00.

For half year ending June 30th, 1899, tons of ore crushed 37,652; average yield per ton, $7.48; gross yield $281,723.00.

It having been shown that William Philpotts who was a witness for the defendant on the former trial of this case, *and who* is now absent in Australia, and not within the jurisdiction of this court, his testimony which was given on the former trial, was read from the stenographer's notes.

WILLIAM PHILPOTTS.

I am a mining engineer. I learned my profession in the Campbell School of Mines in England. I have been with the defendant company for five years. I know the 190-foot level and plaintiff's block 10. I took six samples in there. The first one 23 feet south of the north face. The second one is a sample of the ore that is in

151 the drift. The third one is a sample taken about 16 feet south of the north face. The fourth is about 12 feet south of the north face. The fifth is 6 feet south of the north face, and the

last one is a sample of the face. I am an assayer. I assayed these samples in the usual method. I made a sheet of the assays. Sample No. 1 went 0.12 of an ounce in gold and 0.6 of an ounce in silver, total value $3.34; No. 2 contained 0.11 oz. in gold and 0.9 oz. in silver, total value $3.41; No. 3 contains 0.12 oz. in gold and 0.5 oz. in silver, total value $3.38; No. 4 has a trace of gold and 0.7 oz. in silver, total value 42 cents; No. 5 has a trace of gold and 0.5 oz. in silver, total value $.30. No. 6 is 0.2 in gold and 0.8 oz. in silver, total value $.89. Thereupon the defendant produced a duly certified copy of the answer of the St. Louis Company in the case of the Montana Mining Company against the St. Louis Mining and Milling Company, known as the Specific Performance case, and read to the jury the verification to said answer, which said verification is as follows:

Verification.

STATE OF MONTANA, *County of Lewis and Clarke, ss:*

Wm. Mayger, being duly sworn, makes oath and says that he is the general manager and superintendent of the said defendant company, and as such is an officer and agent thereof; that he has
152 read the foregoing answer and knows the contents thereof; that the matters and facts therein stated are true to the best of his knowledge, information and belief.

WM. MAYGER.

Subscribed and sworn to before me this 17th day of December, 1894.

[SEAL.] HARRY H. YAEGER,
Notary Public.

Nine Hour Patent.

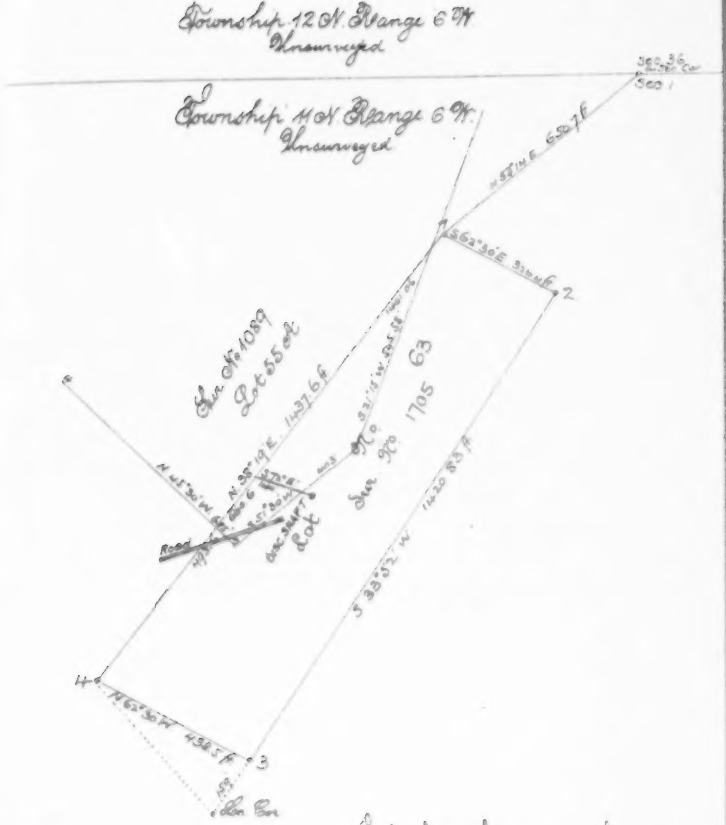
The defendant offered and read in evidence a patent of the United States, being Mineral Certificate No. 1357 issued to Charles A. Broadwater and others, for the Nine Hour Lode Mining Claim, designated as Lot No. 63, and describing the premises so conveyed as follows, to wit:

"Beginning at corner No. 1, a slate stone 33 x 15 x 9 inches marked 1-1705, a mound of rock along side from which a pine tree 9 inches in diameter marked B. T. 1-1705 bears S. 77° West 39 feet distant; thence, first course S. 62° 30′ E., and 326.4 feet to corner No. 2 a slate rock 20 x 12 x 6 inches marked 2-1705, a mound of rock along side. Thence second course 33° 52′ W. 1,420.83 feet to corner No. 3, a slate rock 22 x 14 x 12 inches marked 3-1705, a mound of rock along side, from which the location corner bears 33° 52′ W. 159 feet, distant. Thence, third course, N. 62° 30′ W. 438.5 feet to corner No. 4, a slate rock 20 x 12 x 9 inches marked 4-1705, a mound of rock along side. Thence, fourth course, N. 38° 19′ E. 493.6
153 feet intersects S. W. end of line of survey No. 1089, the St. Louis Lode Claim, from which corner No. 3 of said claim,

bears S. 45° 30′ E. 68.5 feet distant, 660.6 feet to a point from which discovery shaft bears S. 72° E. 140 feet, distant 1,401.06 feet intersects the E. side line of said survey No. 1089. From which corner No. 2 of said claim bears S. 21° 15′ W. 545.58 feet distant 1437.6 feet to corner No. 1, the place of beginning; expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claim or survey No. 1089, and also all that portion of said Nine Hour vein or lode, and of all veins, lodes and ledges throughout their entire depth, the tops of apexes of which lie inside of such excluded ground. Said lot number 63 extending 1,420.83 feet in length along said Nine Hour vein or lode, the granted premises in said lot containing 10.42 of an acre of land, more or less, as represented by yellow shading on the following plat."

The plat referred to is herewith reproduced as follows:

(Here follows diagram marked p. 154.)



Scale of 200 feet to an inch

No. 402
Montana Co
v.
St Louis Co
} p. 154

155 Thereupon the defendant offered in evidence a duly certified copy of the original location notice of the Nine Hour lode introduced in the former trial of this case by the plaintiff and marked Plaintiff's Exhibit No. 3. To the receipt of which in evidence counsel for the plaintiff objected for the reason that said notice was irrelevant and immaterial. The Court having sustained the objection, the defendant duly excepted.

Defendant likewise called and had sworn one William F. Word, a witness in its behalf, who testified as follows:

WILLIAM F. WORD.

I reside in Helena, Montana, and am by occupation a mining engineer. I graduated at the University of Michigan in the class of '85 and for the last fifteen years I have followed mining in one form or another. I have examined mines, have mined, superintended mining operations in the vicinity of Marysville, and have been employed as an expert mining engineer in numerous law-suits. I have worked in similar mines in that vicinity. I have examined the surface of the St. Louis Lode Claim to ascertain the course or strike of its vein, and have been unable to find anything on the surface which would indicate that it passed through the end lines of the claim. I have examined the under-ground workings. The vein shown in the 65-foot shaft is plaintiff's discovery vein. This is the first vein you encounter on entering the tunnel, it has been followed by a
156 drift to the bottom of the discovery shaft. The vein is stoped out but clearly seen in the stope which is only about 30 feet high. The widest point in the vein is in the shaft about two feet. On the level in the face the vein is about 6 inches in width and dips slightly to the northwest. The dip of the vein from the Transcontinental tunnel to the 65-foot shaft is nearly vertical, but it has a slight dip to the northwest. It is about 170 feet between the two points mentioned. There is a small fissure having an almost vertical dip, showing in the southwest side of the Transcontinental tunnel near where the drift or opposite where the drift turns into the northeasterly fissure. It is about 9 or 10 feet outward from the point where the discovery vein meets the Transcontinental tunnel. Following along the Transcontinental tunnel about 90 feet from the point where the discovery vein meets it, we come to a drift on the vein to the southwest, this drift is what is marked on Plaintiff's Exhibit No. 1 as "Discovery." I examined to ascertain whether the two veins might have originally been one and faulted. I do not think they are one. I do not think there is any continuity or identity between them. The southerly one dips to the south, the other is nearly vertical. In addition to that, 30 feet further south the granite meets the slate on the right-hand side, and then 9 feet further on slate on the left-hand side of the tunnel. If these two veins had been one and faulted, in my opinion the slate and granite contact would have been faulted approximately the same as the vein. If there

had been a throw of 90 feet, it would mean that these two
157 veins were originally opposite each other and the ground had been moved up the hill or down the hill as the case might be. In that case there would be drag in there. There should be drag a short distance at each vein. This drag I failed to see. By drag, I mean a portion of the vein would be drawn into the Transcontinental fissure. I examined it carefully and could not find anything of the kind.

Richard M. Atwater was called and sworn as a witness for the defense and testified substantially as follows:

RICHARD M. ATWATER.

I reside in Helena, Montana. I am a mining engineer. I took the course of mining and engineering at the Royal School of Engineers in Berlin, Germany, graduating in 1894, since then I have been continuously engaged in the mining business in Europe, in South Africa, in Australia, in British Columbia and in the United States. I have visited the properties in controversy in this action during the last four weeks and spent considerable time there. I examined the surface of the St. Louis for the purpose of ascertaining the direction or strike of the discovery vein. I found nothing to indicate it on the surface. Entering the Transcontinental tunnel, the first cross-cut that you come to is on the discovery vein. It runs in a northeasterly direction and has been considerably worked. There are two levels, in all about 25 or 30 feet high. Beyond the discovery shaft, the lower level turns slightly more to the
158 east and extends for a matter of eighty feet beyond the discovery shaft. This part of the level has not been stoped, the walls can be seen and the back of the level. Just at the face a block of slate is seen on the eastern side, crossing the level diagonally. The vein at this point is smaller and less well defined than for a distance of 70 feet further back.

On the opposite side of the Transcontinental tunnel from the discovery vein can be seen a distinct fissure which shows as a wide crack in the wall, dipping slightly to the east from 3 to 6 inches, perfectly plain and well defined. It may be and it may not be the extension of the discovery vein. It is impossible to tell until it has been drifted on, but it may be. Proceeding in a southerly direction, the next thing we come to of importance is the drift to the south about 90 feet further in from the discovery drift. Just a little ways further in than the south drift, we come to the contact of the granite and the slate. On the western side that contract is about 15 feet from the south drift. On the opposite side of the tunnel, the granite and slate contact is about 15 feet further in. These contacts are small but are sufficient to be correlated. It is my opinion that these were one and the same contacts, but that they were cut off by the fault fissure, and would therefore constitute a measure of the throw of that fault. I infer that either the western side has slipped 15 feet to the north or that the eastern side has slipped 15 feet to the south.

Going back now to the point where the discovery vein reaches
159 the Transcontinental tunnel. If the fissure shown in the wall to the southwest is a continuation of the discovery vein, it would check up fairly well with the throw of 15 feet in the contact between the slates and granite which I have mentioned. This throw, if it occurred, would preclude the possibility of a 90-foot throw, as you cannot have a throw of 15 feet and another throw of 90 feet on the same fault with apparent parallelism of the various members in question. Furthermore, if these two drifts were on one and the same vein, before it was faulted, there would most certainly be dragged ore on each butt-end, showing the direction of the vein. That is the common way to find in which direction the vein has been faulted, and no such drag pieces are to be found in this case at either the butt-end of the discovery or the butt-end of the south drift.

If extended in its own direction, the discovery vein would cross the easterly boundary line of the St. Louis Claim between corners Nos. 1 and 2 at a point approximately 590 feet south of corner No. 1. I think the discovery vein is a very weak and irregular vein. I think the fissure is very likely caused by the Transcontinental fissure itself, and therefore it would only be a crack.

Cross-examination:

It is my opinion that the faulting movement shown in the Transcontinental tunnel could not have been for a distance of 90 feet because of the fact that the contact between the granite and the slate on the north side of the Transcontinental tunnel is only
160 15 feet distant from the contact on the south side, and therefore it would be impossible for the vein shown in the south drift to be the same vein disclosed in the north drift from the Transcontinental tunnel, and also from other facts which I have stated. If drag could be found along the fault fissure between the northerly and southerly drifts from the Transcontinental tunnel it would be strong evidence that the discovery vein has been faulted and a part of this vein is disclosed in the southerly drift. I spoke of a fissure from three to six inches wide showing on the south side of the Transcontinental tunnel nearly opposite the north drift, which I said might be a continuation of the discovery vein. I regard this as a weak fissure and do not believe that it would extend for any great distance. It is true that the Drumlummon fissure is only three inches wide in places and that this vein extends across the country for thousands of feet.

ALEXANDER BURRELL being recalled as a witness for the defendant, testified substantially as follows:

ALEXANDER BURRELL.

My first experience in quartz mining was in Leadville, Colorado, in 1880. I returned to Montana again in 1888 and since that time I have been engaged with the defendant company in various posi-

tions, more or less connected with mining, for the entire
161 period of seventeen years. I have been inside the Transcontinental tunnel from its mouth to its face and into the north drift to its face and southerly in the south drift to the working shaft of the St. Louis company. I have examined the north and south drift very closely and can see no evidence of what I would consider a fault or throw making these two drifts one vein. I think they are separate veins. On the southwest side of the Transcontinental tunnel near the level on the discovery vein there is a small gash vein that shows very plainly and is probably a continuation of that vein. During my development of the Drumlummon and the various mines connected with it I have driven out many small fissures in search of ore, and I have found a great many of them die out in the space of 20 or 30 feet. My opinion is that if this small fissure was driven out for a short distance, it would disappear. It might go 20 or it might go 100 feet.

The raise was made to the 85-foot level, and the excavation of Block 8 was made in November, 1898. After we had commenced work in Block 8 we were enjoined from further operation, and we stopped work upon service of the injunction order.

Thereupon the injunction order was identified by the witness, and was offered and received in evidence, and is as follows, to wit:

162 [Title of Court. Title of Cause.]

Provisonal Order of Injunction.

To The Montana Mining Company, Limited:

Upon reading and filing the complaint herein, duly verified, and the affidavit of William Mayger, on motion of Messrs. E. W. Toole and Thomas C. Bach, solicitors for the complainant.

It is ordered that you, the above-named defendant, Montana Mining Company, Limited, show cause before this court, at the courtroom, in the Gold Block, in the City of Helena, County of Lewis and Clarke, State of Montana, on the 26th day of November, 1898, at 10 o'clock A. M., why a preliminary injunction should not be granted in said suit restraining you from further prosecuting any work or extracting any ore or other material from the vein, lode or ledge situated on the St. Louis Lode Mining Claim, in the Ottawa Mining District, in the County of Lewis and Clarke, and State of Montana, and particularly described in said bill of complaint as follows, to wit::

Commencing at a projected parallel and line of said St. Louis quartz lode mining claim, at a point on the east side line thereof, between corners 1 and 2, extended vertically downward, whereat it passes through the hanging-wall of said vein, lode or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis quartz lode mining claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging-wall is dis-
163 closed at the surface by an upraise at said projected parallel end line, five feet west of the east side line of said St. Louis

quartz lode mining claim; then from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512.7 feet to a point, being the intersection of the said east side line of said St. Louis quartz lode mining claim between corners 1 and 2, with the west line of the thirty-foot strip described in the complaint herein; thence south fifty degrees fifty minutes west 108 feet and along the west line of the said thirty-foot strip to a projected parallel end line of said St. Louis quartz lode mining claim, extended vertically downward which passes through the hanging-wall of said vein at the surface and at the crossing of the said hanging-wall with the west line of the said thirty-foot strip.

And it is further ordered by the Court that you and each of you, your agents, servants and employees be in the meantime restrained and forbidden from further extracting or removing any ore or other material from the said premises, or disposing of, treating or reducing any ores by you heretofore removed or extracted from said premises.

Dated Helena, Montana, November 19th, 1898.

HIRAM KNOWLES, *Judge.*

164 [Endorsed:] Title of Court. Title of Cause. Provisional Order of Injunction. Original. Filed and entered Nov. 23, 1898. Geo. W. Sproule, Clerk.

The order subsequently made modifying the temporary injunction was also read in evidence, and is as follows, to wit:

[Title of Court, Title of Cause.]

Order Modifying Temporary Injunction.

This cause coming on this day to be heard upon the application of defendant for a modification of the temporary injunction order heretofore issued in the said cause, so as to permit the timbering of a drift run by defendant into what is known as the compromise ground at the bottom of the plaintiff's winze near its 85-foot level, and also, so as to permit the defendant to remove and store the ore taken from the said compromise ground now in the defendant's chutes, supported by the affidavit of William M. Philpotts, and it appearing therefrom that the modification asked for should be granted, and everything being fully understood and considered;

Now, therefore, it is ordered and decreed that the said temporary injunction order heretofore issued in the said cause on November 19th, 1898, be and the same is hereby modified so as to permit the said defendant company to timber in a good and substantial manner the drift run by the said defendant for a distance of about 28 feet southerly from the south end of plaintiff's winze at or near its 85-foot level, so as to prevent the hanging-wall of the vein at
165 said point from caving in, and to preserve the said drift from injury from caving.

And it is further ordered that the said injunction order be further modified so as to permit the defendant company to remove from the chutes running from the above-described drift down to defendant's 400-foot level, the ore now contained therein as set forth in said affidavit, and to store the same in a safe and convenient place where the same shall be always subject to the further order of this Court, and that upon removing the said ore the defendant shall file with the clerk of this court a true and correct statement of the amount of ore so removed, and the place where the same is stored.

It is further ordered that the said temporary injunction order subject to the foregoing modification be and the same is hereby continued in force until the further order of this Court.

Dated November 26th, 1898.

HIRAM KNOWLES, *Judge.*

[Endorsed:] Title of Court. Title of Cause. Order Modifying Temporary Injunction. Filed and entered Nov. 26, 1898. Geo. W. Sproule, Clerk.

The affidavit of William Philpotts, upon which said modification was made, was also read in evidence, and is as follows, to wit:

166 [Title of Court, Title of Cause.]

Affidavit of William Philpotts.

UNITED STATES OF AMERICA, *District of Montana, ss:*

William M. Philpotts, being first duly sworn says: I am over the age of twenty-one years. I am at present employed as mine superintendent of the above-named defendant, and I have been employed by said defendant for about four and one-half years in said capacity, and as assistant engineer. I am well acquainted with the working done by said defendant on the Compromise ground and on the Nine Hour Claim east of said Compromise ground, the said defendant has recently made an upraise from its 190-foot level on the Nine Hour claim to the bottom of the plaintiff's winze at or near its 85-foot level and from the south end of said winze it has run a large drift southerly in the said compromise ground, for a distance of about 28 feet. That said upraise starts on the said 190-foot level at a point about 15 feet east of the east side line of the compromise ground and runs thence through Nine Hour ground a distance of about the same number of feet before passing into the compromise ground, and from the point last named it is run wholly within the compromise ground. That the drift above mentioned is likewise wholly within the compromise ground, and from its commencement is north of the projected end line of plaintiff's said St. Louis claim as defined by the temporary injunction and the affidavit upon which the same
167 is based; that the ground in said drift is of a soft and pliable nature, readily yielding to slaking by the action of the

atmosphere; that by the service of said injunction the defendant was prevented from timbering said drift, which is absolutely necessary to preserve said drift and prevent the loss of large quantities of the ore therein contained. That the hanging-wall of the vein at said point would, if a cave occurred, fall with the ore and thereby seriously impair the grade of the ore, wherefore affiant says that defendant is likely to sustain great and irreparable injury if said injunction is not so modified as to permit it to timber said drift so to protect the same. That the timbers therefor are provided and on the ground, and it will not take more than three or four days to put them in place.

And affiant further says that in taking ore from the said drift, it passes through a chute from said drift, down said upraise to the 370-foot level in defendant's Nine Hour ground; thence it is trammed a distance of about 100 feet to a chute leading to what is known as defendant's 320-foot level; from the point where said chute reaches said level, it is trammed a distance of about thirty feet to a chute leading to the 220 level; and thence it is trammed a distance of about sixty feet to a chute leading to the 400-foot level, from which last point it is trammed to defendant's mills; that at the time of the service of said injunction the chutes above named all contained ore taken from said compromise ground. Affiant says he is a

168 civil engineer by profession, that he is well acquainted with where the lines of said compromise ground would fall in all of the workings of said defendant under ground, and knows as mine superintendent from what point the ore came which is now in said chutes, that there is not one pound of ore therein which did not come from said compromise ground, but the same all came from the drift above mentioned and described. That owing to the fact that said upraise reaches the bottom of plaintiff's winze, there is a strong circulation of cold air through said opening, and in the vicinity of said chute, which will freeze the ore contained therein into a solid mass, if allowed to remain therein without being disturbed for any considerable length of time, and if said ore is once frozen in said chutes, it will probably involve the destruction of said chutes in order to get it out, and new chutes will have to be constructed at great expense to defendant company in order to continue mining from said compromise ground, and defendant would otherwise be greatly injured and damaged thereby.

And affiant further says that he is well acquainted with the financial condition of the said plaintiff, and knows that it is insolvent, and that wages due to its late employees are due and that they have no means of recovering the same, and that the said plaintiff company has neither property or credit out of which any judgment for damages could be made.

And affiant further says that the temporary injunction

169 heretofore granted should be further modified so as to permit the defendant company to remove the said ore from said chutes, and store the same in some safe place until the hearing of plaintiff's motion for a temporary injunction, or if worked, that

defendant keep careful account of the same and the proceeds thereof and account for the same as may hereafter be directed by the Court.

That affiant is well acquainted with the financial condition of the said defendant, and that it is able to respond in damages to said plaintiff in many times the value of the ore now in said chutes, and further affiant sayeth not.

W. M. PHILPOTTS.

Subscribed and sworn to before me this 24th day of November, A. D. 1898.

[NOTARIAL SEAL.] W. E. CULLEN, JR.,
Notary Public in and for Lewis and Clarke County, Montana.

[Endorsed:] Title of Court. Title of Cause. Affidavit of William M. Philpotts. Filed Nov. 26, 1898. Geo. W. Sproule, Clerk.

The witness continued: There were 60 or 61 tons of ore taken out of this upraise, which ore is now stored in the yards of the Montana Mining Company subject to the order of this Court. About 40 tons of the ore that was taken out of Block No. 8 was milled and the remaining tons are in the raise above the 190-foot level. There must be 65 or 70 tons in the raise.

170 I am the Alexander Burrell who was named as one of the defendants in this case when it was first brought, and the same person named as Alexander Burrell in the original complaint. At the time of the service of the summons, I resided at Marysville, Montana. I know Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell and Thomas Hawkins. They all resided at Marysville, Montana, at the time of the service of the summons in this case.

Cross-examination:

Some of the ore taken out between the 108 and 133-foot planes was shipped to the smelter. It is true that high grade ore was often mixed with the low grade ore in order to keep up the average of the mine. The ore from Block 8, which was taken out after the modification of the injunction order, was taken down to the 190-foot level and from the 190-foot level to the 400. This ore was put in the chutes with other ore. All of the ore in the chutes was taken out together.

In Rebuttal.

JOHN R. PARKS testified as follows: Assuming that the movement along the fault fissure disclosed in the Transcontinental tunnel had displaced the contact between the granite and the slate for a distance of 15 feet, I would still say that this fault fissure has caused a throw of 90 feet in the discovery vein. I have made a little model to explain the geology of that. (Model produced and ex-

171 planation made to the jury.) There are workings below the Transcontinental tunnel along the fault fissure. There is one 50 feet below, one 150 feet below, and one 250 feet below. These

levels are now and for some time have been inaccessible. There is a drag shown in all of the three drifts along the Transcontinental fissure below what is known as the Transcontinental tunnel. Down at the bottom there is unmistakable drag from the fissure in the north drift to the fissure in the south drift. As we go down in the lower workings the space diminishes between the north and south veins. Blocks 4 and 9 have been stoped out. I was in the stopes and surveyed the same and from this survey determined the cubical contents.

CHARLES MAYGER testified that Blocks 4 and 9 had been stoped out; that he had taken out the lagging on the north side of the Montana company's apex shaft above the twenty-foot level and found broken timbers and coved ground along where Block 9 was taken out.

WILLIAM MAYGER, recalled as a witness for plaintiff, in rebuttal, testified that the ore taken from Blocks 8 and 11, and all of the blocks between the 133-foot plane and the 108-foot plane, outside of the ores that were taken in 1893, were all mixed together promiscuously from the 190-foot level to the 400; that on the discovery vein of the St. Louis Claim there is a level running southerly
172 from the Transcontinental tunnel to within 95 feet of the south end line. There is another level 50 feet below that extends probably 200 feet from the Transcontinental tunnel and another level 150 feet below the Transcontinental tunnel that runs southerly probably 350 feet. There is also the 250-foot level. There is a working along the line of the fault fissure 250 feet below the Transcontinental tunnel. There is another working along the fault fissure 150 feet below. In that working there is a great deal of drag shown along the fault fissure between the northerly and the southerly sections of the discovery vein. There is also drag on every level. The Transcontinental tunnel is closely timbered on top, and for this reason the drag cannot be seen in that tunnel. I mean by drag, broken up quartz that has been rolled until its edges are worn. It is quartz that is not in place. This drag shown along the fault fissure is mineralized. The St. Louis company obtained an injunction preventing the defendant from sinking its apex shaft. The apex shaft had been sunk about 35 feet. After this injunction was obtained the defendant commenced stoping, and it was necessary to procure a second injunction. The sampling done by Mr. Hand was not specifically for value, but for the purpose of determining the width of the vein and the apex of the vein. I know that Mr. Hand went to Blocks 4 and 9. I went with him.

The foregoing contains a statement of so much of the evidence or other matter as is necessary to explain the exception and its relation to the case, and to show that the ruling tends to preju-
173 dice the rights of the defendant.

And thereupon the evidence being closed, the defendant moved the Court in writing to direct the jury to return a verdict in favor of the defendant. Said motion is as follows, to wit:

[Title of Court, Title of Cause.]

Motion for Verdict.

Now comes the defendant, at the close of all the evidence, and moves the Court to direct a verdict in its favor, and against the plaintiff, on the following grounds, to wit:

1. The pleadings do not allege that the discovery vein of the St. Louis passes out through either end line, and there is no foundation for the introduction of evidence upon that issue, and without that issue proven there can be no extralateral right and no recovery.

2. There is no sufficient evidence that the discovery vein of the St. Louis in fact passes through either end line, and therefore the plaintiff has proven no right to any of the ores claimed in this action.

3. The plaintiff alleges in its complaint that the hanging-wall and the foot-wall of the Drumlummon vein on the south end, each pass out through the side line, and that the hanging-wall of the same vein passes through another side line in departing on the north end. Such a vein can have no extralateral rights; and as all the extraction involved in this section is outside of the vertical plans of the St. Louis side line, plaintiff cannot recover.

174 4. The evidence fairly shows that no part of the Drumlummon vein apex cuts either end line of the St. Louis, and therefore plaintiff has shown no rights to any of the ores involved in this action.

5. The decree in the specific performance suit, in evidence in this case, is a final judgment, perpetually enjoining plaintiff from ever asserting its possession or right of possession in any part of the premises known as the compromise strip, and as this action of trespass can only be maintained when there is possession or right of possession, the said decree is a perpetual bar to this suit.

6. The said decree, and the bond on which it is based, each serve to create of the west side line of the compromise strip a vertical common-law bounding plane, and to pass all minerals contained beneath the surface of said strip; and the plaintiff in the excepting portion of the premises described in the complaint expressly disclaimed any interest in the mineral therein contained.

7. The said decree and said bond granted to defendant's predecessor all the minerals beneath the surface of the vertical planes from the surface boundaries of said strip.

8. The plaintiff has failed to show the tonnage value of the ore extracted before the commencement of this action, and under the evidence there could be no finding of the amount or value thereof, and for ore extracted after the commencement of this action, there can be no recovery in this suit.

W. E. CULLEN AND
W. E. CULLEN, JR., AND
WM. WALLACE, JR.,
Attorneys for Defendant.

175 [Endorsed:] Title of Court and Title of Cause. Motion for Verdict. Filed June 30th, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

But the Court denied said motion and refused to so instruct the jury.

To which said ruling of the Court and to its refusal to give the jury such instruction, the defendant then and there duly excepted, and excepted to such refusal of the Court upon every specific ground in said motion contained.

Whereupon counsel for the plaintiff moved the Court for leave to amend the *ad damnum* clause of their complaint so as to change the $50,000.00 therein mentioned to $400,000.00, making the entire claim for damages $600,000.00.

To which amendment the defendant objected as follows:

By Mr. WALLACE: Upon the statement of counsel in open court that his proposed amendment is to change the word fifty in the supplemental damage paragraph of the complaint to four hundred, and to change the words two hundred and fifty in the prayer, to six hundred, the defendant interposes the following objections to the application of plaintiff to make the amendment in question:

First. Because there is no showing of merits to warrant such amendment.

Second. Because the right to make the amendment is barred by lapse of time.

Third. Because the right never existed to make such an amendment in this cause of action for the reason that the effect
176 would be to increase the amount claimed in the supplemental portion of the complaint, between the period since the commencement of the action and the present trial. And that the law forbids the recovery in this kind of action of any damages save those damages resulting from acts of trespass committed prior to the commencement of the suit itself, and there has been no waiver of this unless it be as to the $50,000 plead as supplemental damages by the amended complaints of November 21st, 1898, and June, 1899.

Fourth. There can be no recovery of damages resulting from extraction from the Drumlummon vein since September 16th, 1893, and as the effect of the proposed amendment is simply to change the amount of damage alleged to have happened from extraction since that date the amendment would be unavailing and would allege damage within a period as to which the law will permit no recovery in this action.

Fifth. There is no testimony in the case showing or tending to show that the damage, if any, exceeds the sum of $276,000.00.

Sixth. That objections to the proof as to quantity in block and as to value as not justified by the pleadings were severally reserved at the time the proof was offered by the plaintiff, such objections and exceptions being taken upon the part of the defendant as to each block within planes 108 and 133 and as to each block shown by their testimony to have been extracted since September 16th, 1893, and

such objections and exceptions being taken at the time
177 severally that the proof was offered as to each block, whether on the part of the witness Mayger or the witness Parks.

But the Court overruled each and every of said objections and allowed the amendment of said complaint to be made.

To which ruling of the Court the defendant then and there duly excepted.

Thereupon plaintiff having introduced its proof in rebuttal and rested, and after argument of counsel, the Court instructed the jury in writing as follows, to wit:

[Title of Court, Title of Cause.]

Instructions to Jury.

GENTLEMEN OF THE JURY:

To those whose pursuits in life may have been wholly aside from theoretical or practical mining, it is a complicated task to follow testimony with comprehension, through several weeks, where geologists and expert mining men are the principal witnesses, and scientific truths are involved in the trial. But I have observed that you have given very close attention to the witnesses, prompted, I am sure, by a conscientious desire to remember what they say, to understand their explanations, and to weigh their statements carefully and well.

A case like this is unusual in its importance. Sufficient allusion to its history has been made to disclose to you that it is a great legal battle, which has continued for many years, waged on the respective sides by counsel eminent for their learning in the law, who have been fighting for their clients with unflagging industry and
178 skill; all earnest in their views of the law, and each side strong in the assertion of the existence of facts upon which it bases its claims for a verdict and judgment. As jurors, it must have been interesting to you to watch the progress of such a trial, impressed with the fact that you constitute a vital part in the conduct of the litigation. Being impartial men sworn to bring in a true verdict according to the evidence, you are now about to approach the concluding act of your duty by weighing all the evidence, applying the law to it, disregarding extraneous matters not justified by the evidence, and thereafter stating your conclusions, upon which will rest the judgment of the Court and its ultimate determination of the rights of these parties.

In the courts of the United States, the Judge presiding at a trial is authorized, whenever he thinks it will assist the jury in arriving at a just conclusion, to express to them his opinions upon the questions of fact, which he submits to their determination; yet you must understand that you and not the Court, are to decide the facts. I leave the facts in unequivocal terms to your judgment as within your true and peculiar province.

By consent of the parties and the Court, you have inspected the actual present physical conditions. This will doubtless enable you

to understand the situation more vividly that you otherwise could, and help you in weighing the evidence in its exact application to the whole case; and now that the testimony is concluded, and the arguments of counsel have been made, it becomes proper for the Court to charge you upon those principles and rules of law which
179 are pertinent to the issues and which must govern in your deliberations.

The action is brought by the St. Louis Mining & Milling Company against The Montana Mining Company, Limited, to recover damages for an alleged trespass. The plaintiff, in its complaint, alleges the corporate character of the parties interested in this suit; the ownership of the St. Louis quartz lode mining claim; setting forth a description thereof; that the discovery, location and patent of the St. Louis mining claim was prior to the discovery, location and patent of the Nine Hour quartz lode mining claim; that the apex of the Drumlummon vein is within the surface boundaries of the St. Louis quartz lode mining claim, between the 520 and 133-foot planes, specified in the complaint; and that the plaintiff has a right to follow said vein on its dip to its outermost depth, even though in its downward course it should pass beyond the vertical plane of its side lines. It further alleges that the defendant has entered upon that part of the said Drumlummon vein which has its apex between the two planes aforesaid, and extracted ore therefrom of the value of six hundred thousand dollars.

Defendant, in its answer, admits the corporate character of the parties, the ownership of the St. Louis quartz Lode Mining Claim, as alleged in the complaint, and that the discovery, location and patent thereof were prior to the discovery, location and patent of the Nine Hour Quartz Lode Mining Claim, owned by the defendant; and then denies generally each and every other allegation of the complaint. The defendant's answer then contains
180 affirmative allegations which are not important in this trial and therefore no further reference is made thereto.

1. The term vein, lead, lode and ledge all mean the same thing. A vein may be said to be a seam or fissure in the earth's crust filled with quartz or some other kind of rock in place, carrying gold, silver or other valuable mineral deposits named in the statutes of the United States. It is whatever the miner would follow expecting to find ore, some formation within which he would expect to find ore, outside of which he would not expect to do so. The miners thus make the definitions of a vein. Geological opinions and definitions are not conclusive upon you as to the nature, element or width of a vein or its apex. The law has defined each, and the definitions of the law are controlling, as given you in these instructions. Judge Hawley, United States Judge from Nevada, in defining lodes and veins said; "To constitute a vein it is not absolutely necessary that there should be a clean fissure filled with mineral, but it may and does exist when filled in places with other matter. The fissure should, of course, have form and be well defined, with hanging and foot-walls. Between these walls will be found bodies of quartz, rich or poor, but there is also liable to be found in many

places short or long distance between the quartz bodies or pay chutes where no quartz will be found in the fissure between the walls. Yet the vein exists, and is often as well defined as if the same was filled with quartz. The clay, the selvages, slickensides, striation, and ribbing of the walls are frequently as strong evidence of the
181 indication of permanency and continuity as the existence of the quartz itself."

2. The apex of the vein may be said to be the top of the vein at the point where it comes nearest the surface of the earth, the entire top of the vein between the two walls thereof, which comes nearest the surface of the earth.

3. At common law, which is the law we inherited from our ancestors, whoever owns surface of the earth, owns all beneath the surface, that lies within its boundary lines drawn downward vertically. This is still the law as to all classes of land except mineral land. If you make a homestead entry of public land, or enter it under any of the other public land laws of the United States, except the mineral land act, the government grants you title, not only to the surface, but to everything beneath the surface. For example, if you had entered in good faith a piece of agricultural land and obtained a United States patent for it, if afterward there was discovered within its surface boundaries, by yourself or anybody else, a mine, it would be absolutely yours, and no one could interfere with your working it, or mining it to any extent you might desire, so long as your work did not extend outside of the surface lines of your land extended downward vertically, but you could not follow the vein or pay streak beyond your surface boundaries without becoming a trespasser. Since the passage of the mineral land act, when a mining claim is entered under its provisions, and a patent issued for it, it contains two features at variance with this common law right, which I have explained to you.

182 First. The patentee may follow, on its dip, any vein or lode, the top or apex of which may be found within its surface boundaries, to any depth, though on its course downward into the earth, it departs so far from the perpendicular as to pass out of his own ground through a side line of his claim projected downward vertically, and into the territory of his neighbor, and, secondly, it reserves to the adjoining claim owner the right to follow his lode, into and under the mining claim thus granted in the same manner. Thus a patent for a mining claim contains a grant and a reservation, neither of which is to be found in the patent for agricultural land. This is the extralateral right already referred to.

The extralateral right, thus conferred upon the patentee of a mining claim, can only be exercised in one way. Having the top or apex of the vein within the surface boundary of his own claim he must follow it down on its dip into the territory of his neighbor. He may not go upon his neighbor's claim and sink a vertical or other sort of a shaft down to the ore he claims, nor may he, by running a tunnel into or through or partly through his neighbor's claim reach the ore body claimed by him. If from lack of continuity of the vein, or from any other cause, he cannot follow the ore in

on its dip, from its top or apex on his own ground, down into his neighbor's mining claim, then such extralateral right is lost to him, and the ore lying within the adjoining claim becomes the property of the owner of such claim, under the doctrine of the common law, which I have just explained to you.

183 4. The plaintiff claims extralateral rights on lode or vein which it alleges enters its St. Louis claim at what it terms its 520-foot plane, which is an imaginary line, if drawn down at a point 520 feet southerly from corner No. 1 of its claim, parallel to a line which it terms its end line, and which bounds its rights in a northerly direction. This vein, which in the evidence is generally termed the Drumlummon vein, traverses its claim in a southerly direction, passing out of its said claim through the westerly boundary line of the compromise ground, at what it terms its 133-foot plane, which is likewise an imaginary line parallel to what it terms its end lines and drawn down to the eastward on the Drumlummon vein on its dip. It claims that it has a top or apex, or a portion of the top or apex of this vein within the surface boundaries of its said St. Louis claim, and that therefore it has the right, under the mineral land act of the United States, to follow this vein down on its dip, though it passes through its easterly boundary line and into and under the mining claim of the defendant, known as the Nine Hour Claim. It is further claimed on the part of the plaintiff that the defendant has taken, carried away and converted to its own use, a large amount of ore, which was situated in the vein beneath the surface of its ground at points where the apex of the vein was within plaintiff's ground, and for this alleged trespass, the plaintiff claims damages. Now, as I have said, the owner of a mining claim is entitled to follow his discovery vein on its dip into the earth, though it may extend outside of the vertical side lines of his location and into the territory of his neigh-

184 bor. This is called the extralateral rights. He also has the right to pursue any other lode or vein, having its top or apex within the surface boundaries of his claim, to the same extent and in the same direction, as he may pursue his discovery vein. Suppose, for example, that the plaintiff has satisfied you that it has within the boundaries of its St. Louis claim, a discovery vein running generally in a northerly and southerly direction extending through the ground, included within the surface boundaries, and that the dip of this vein is to the east, then it would be entitled to follow this vein into and under the Nine Hour Claim, if following it on its dip, it extended so far. It would likewise be entitled to follow the Drumlummon vein on its dip for so much of the distance as the top or apex of that vein is found within the surface boundaries of the St. Louis Claim, as the plaintiff is entitled to extralateral rights on its discovery vein, as herein stated, and it would be entitled to all ore found within said Drumlummon vein for such distance, even though the same were under the Nine Hour surface lines.

5. The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein

in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this *prima facie*
185 case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights.

6. Your first duty therefore is to examine and ascertain what, if any, extralateral rights attach to the discovery vein of the St. Louis Claim, and the plaintiff's extralateral rights on the Drumlummon vein, between the said planes, is controlled by its extralateral rights on its original or discovery vein.

7. It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis Quartz Lode Mining Claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence; but the defendant insists that the St. Louis Quartz Lode Mining Claim is not entitled to extralateral rights on the Drumlummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary or incidental vein of the St. Louis Claim. Under the statutes of the United States, the locators of a mining claim have the exclusive right of possession and enjoyment of all the surface included within the lines of their location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such vein, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location. These extralateral rights, under decisions of the Supreme Court of
186 the United States, as to the secondary or incidental veins, are the same as those given by the statute upon original or discovery veins; and if, therefore, plaintiff had extralateral rights upon its discovery vein, including that portion of the St. Louis Claim within the above planes in which is found the apex of the Drumlummon vein, so called, then plaintiff has extralateral rights upon that part of the Drumlummon vein. Plaintiff claims that the original or discovery vein of the St. Louis Claim runs through the earth beneath the surface of said claim in the general course of the side lines of said claim.

If you find from the evidence that the original or discovery vein of the St. Louis Claim, on its course or strike, passes through the earth within the limits of its surface boundaries, between the 520 and 133-foot planes, on a general course lengthwise of the claim, then plaintiff has extralateral rights to such parts of the original discovery vein between said planes, and would have corresponding extralateral rights upon any secondary or incidental veins having their apices in the St. Louis Claim within said planes.

8. If you find that the course or strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or

elsewhere, is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location.

And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extralateral rights on that
187 part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis claim, between the 520 and 133-foot planes, that the discovery vein of the St. Louis Claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis claim between such planes generally lengthwise of the claim.

9. And if you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) runs lengthwise of the St. Louis claim between its side lines, and extends from the 520 to the 33-foot plane, and dips easterly, then plaintiffs would be entitled to extralateral rights for that vein (or those veins) and to the like extralateral rights for all other veins having their apices within the same limits, and running in the same general direction.

10. Should you determine that the plaintiff by virtue of its ownership of the St. Louis Quartz Lode Mining Claim, has extralateral rights to the Drumlummon vein, so called, between the 520 and 133-foot planes, the next question for your consideration is the amount of ore extracted from said St. Louis Mining Claim by the defendant herein. This is purely a question of fact, which you must decide from the preponderance of the evidence introduced before you by the respective parties and the presumption as herein stated. You must find from said evidence the amount of ore extracted from said Drumlummon lode by the defendant, and I charge you, as a matter of law, that defendant is liable to the plaintiff for the
188 value of such ore to the extent and for the amount hereinafter stated.

11. There are two rules established and adopted by the federal and other courts of the United States with reference to the measure of damages in cases of this kind, and which rule applies, depends upon whether or not the trespass under which the ore was extracted was willfully committed or done in good faith. If you find from the evidence that the defendant entered on that part of the said Drumlummon vein which apexes in the St. Louis Quartz Lode Mining Claim, between the planes aforesaid, and extracted the said ore therefrom willfully, recklessly and with knowledge that said vein did apex within the St. Louis claim, then your verdict must be for the value of the ore which you must determine from the evidence introduced. If, however, the defendant had sufficient reason to believe, and did honestly believe at the time it entered upon said vein and extracted and removed said ore, that the same belonged to said defendant and not to the plaintiff, and that it had lawful right and authority to extract and remove the same, then the trespass was not willful, and the plaintiff is entitled to the value of the ore, subject

to the deduction for the reasonable cost of mining said ore, hoisting the same to the surface, and transporting the same to reduction works, and the reasonable cost of such reduction. The actual cost to defendant of all, or any of these items is not conclusive upon the value thereof. Defendant is not entitled to reduce the value of the ore by any sum greater than the reasonable value of the items
189 above mentioned, and you must determine such reasonable value from the evidence given in the case. In determining the character of the trespass, you have the right to disregard all testimony given by the defendant tending to establish good faith, if, in your judgment, the action of the defendant discloses to your satisfaction that the claim of defendant, that it acted under an honest belief that it owned the ore in question and had the right to remove it, was merely for the purpose of reducing the damages which it would have to pay for such ore upon a suit to recover the value thereof by this plaintiff, and find that the action of defendant in extracting and removing the ore in question was willful.

12. In determining the question of the good faith of defendant in extracting and removing the ore in question, you are entitled to consider all the facts and circumstances shown by the evidence; if you find that the defendant acted under an honest belief that it was the owner of the ore in the disputed ground, and had good right and lawful authority to extract the same, and that such belief was based upon such facts and circumstances as that you believe that an ordinary man, acting as you find the defendant acted, would have had the honest belief that he owned such ore and had a right to remove it, then the trespass was not willful.

13. The advice of counsel is admissible for the purpose of showing good faith and innocent intention on the part of the person who acts under it, but to be of avail for that purpose it must appear in the evidence that the party who relied upon the advice had made
190 a fair and full statement of all the facts concerning the point upon which the advice was given, to its counsel. If all the material facts were known to the client and not disclosed to the counsel, the advice would not sufficiently show good faith; and if the parties seeking the advice knew that such advice was incorrect, such advice should not be considered as sufficient upon the question of the good faith of the party.

14. The burden of proof is upon the plaintiff to show by a preponderance of evidence, its ownership, the amount of ore extracted and its value; and in arriving at a verdict you are to take into consideration all of the circumstances and facts presented by the evidence in the case. However, if you are satisfied that the plaintiff has shown its ownership and given evidence tending to show the amount of ore extracted and the value thereof, the burden is upon the defendant to show, if it can, that the trespass complained of was not willful. A presumption arises from the extraction of the ore from a vein which has its apex within the plaintiff's claim, by the defendant, that the trespass was willful, and that the defendant is liable for the value of the ore taken from the mine. This presumption is, however, disputable, and the burden is upon the de-

fendant to show in mitigation of damages that it was not a willful trespasser, and thus be relieved from the payment of the value of the ore stated in other instructions herewith given to you.

15. If you find that the defendant has prevented the plaintiff from ascertaining the exact amount of the ore or its value, by extracting and removing the same, or has placed it beyond the power of the plaintiff to make such proof certain and specific, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by his conduct by making every reasonable intendment against him in favor of the party injured.

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16. In estimating the damages to the plaintiff, if you find from the evidence that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by extracting the greater part of the ore, or all of the valuable ore in any particular places of the mine, or by mixing the ore taken from plaintiff's ground with ore of less value, belonging to defendant, or with any other material taken from any other places in the mine, then the jury, in determining the value of the ore taken, are at liberty to consider the highest value of ore found in the vicinity of the ore extracted.

17. If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use, quartz, rock and ore within the planes described in the complaint, from said vein, lead or lode, belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass, cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injuries it has sustained.

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18. The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the money expended in the running of levels, sinking of shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant or any salaries paid to its officers, or any wages to any persons except those actually employed and engaged in extraction, transportation and milling of the ores in question.

19. When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered

under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same
193 as though it was a trespass upon said claim within its surface boundaries. And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis claim and the ore extracted therefrom.

20. If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and 133-foot planes, and the value thereof, and that it did not do so, but took away from the plaintiff the means of providing the true and correct amount and value thereof, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by the misconduct of the defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find the facts as above indicated, you are at liberty to follow the evidence given in behalf of plaintiff as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence.

21. As to the evidence disclosed by the books of defendant and the abstract thereof offered in evidence in behalf of the defendant, I charge you that to entitle them to be considered as sufficient
194 evidence to prove the value of the ore extracted from the Drumlummon vein, you must be satisfied that the ores taken from other parts of defendant's mine which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition.

22. In considering the weight to be given such books and abstracts of the defendant company, in determining the reasonable cost of the mining, hoisting, transportation and milling of the ore, you should be satisfied that the ore from other parts of the defendant's mine, mixed with the ores extracted from the plaintiff's vein, if you find such to be the fact, were substantially the same class or kind or ores; that it was mined for substantially the same cost as the ore of plaintiff; that it was hoisted and transported to the mill at substantially the same cost, and that it was of the same general character as plaintiff's ore, and would mill as easily and successfully and at the same general cost.

23. The law is well settled that if one willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value *of* which the property in question can be reasonably estimated.

24. It is a principle of law that if weaker and less satis-
195 factory evidence is offered by a party, when it appears that stronger and more satisfactory evidence was within the power of that party to furnish, the evidence of a weaker nature will be viewed with distrust. You will apply this principle in determining the weight of the evidence before you upon all issues in support of which you find that either party had power to furnish stronger evidence and more satisfactory evidence than it has introduced upon such issue.

25. When you are told in this charge that the burden of proof upon any issue is upon either party to this action, you are to understand that such party must present evidence for your consideration which preponderates over the evidence of the other party upon that issue; and if, after due consideration of all the evidence introduced by the party having the burden of proof, it does not preponderate in his favor, but that the evidence of each party upon the issue is equal, in your judgment, it is your duty to find such issue against the party having the burden of proof, under these instructions. In determining the weight of the evidence you are not to consider alone the number of witnesses which have been sworn in behalf of either party, but to take into consideration the circumstances under which the evidence was given, the character and standing of the witnesses, their appearance upon the witness stand, and all the circumstances of their evidence, and after such consideration, you are to determine the weight and preponderance of the evidence upon each issue in favor of one or the other of the parties to this suit.

26. The plaintiff, in case the jury find a verdict in its
196 favor, is entitled to interest upon the amount found by the jury, from the date of the conversion of the ore by the defendant to the date of the rendition of the verdict by the jury, at the rate of eight per cent. per annum. If you cannot determine the dates of conversion of the ores, by the defendant, the plaintiff is entitled to recover interest on the value of the ores extracted, as found by you, from the date of the filing of the amended and supplemental complaint herein, on the 26th day of June, 1899. And you should add such interest to the amount which you find to be the value of the ore extracted, for which defendant is liable to plaintiff as damages, and return the same as a part of your verdict.

27. The presumption that a witness speaks the truth may be repelled and the witness held to be impeached by the manner in which he testifies, by the character of his testimony, by evidence affecting his character for truth, honesty, or integrity, or his motive, or by contradictory evidence, or by statements made out of court not in accordance with his testimony upon the witness stand. The jury are the exclusive judges of the credibility of each and all the witnesses and the weight or value to be attached to the testimony of each witness.

28. There can be no recovery in this action for ores extracted after June 26th, 1899.

29. There is also in issue between plaintiff and defendant as to what number of cubic feet should be used in determining the number

of tons, after you have computed the cubic contents of any given block or blocks. On this issue the burden is on the plaintiff,
197 and you will consider the whole evidence and use such a number of cubic feet per ton as in your good judgment, under all the evidence, would fairly represent a ton in weight of the particular ore involved. This may follow in different blocks if the ore varies in weight, and having determined this number of cubic feet per ton of any number of blocks, you will apply the same in determining the tonnage of the cubical contents for the purpose of fixing the value thereof.

30. The width of the ore extracted with the thickness thereof, is one of the material questions in this case, as to any block or blocks, you will carefully consider the evidence offered and the probable width thereof; and you will determine such width by the preponderance of the evidence upon that issue; and when you have determined it, you will apply this width, and no other, to the block or blocks as to which you find it to represent the true width of the ore extracted.

31. As to blocks 4 and 9, the defendant denies that they were ever extracted except the lower portion thereof, represented by the 18-foot level of the St. Louis company; and as to such portion, insists that they were extracted by plaintiff company. If you find they were not extracted by the defendant, then, of course, plaintiff is not entitled to recover for the value of the ore therein contained. If you are satisfied that the blocks 4 and 9 were extracted by the defendant, and that the plaintiff extracted the ore in the 18-foot level, you will award the plaintiff damages for the value of the ore extracted
198 by the defendant, and not that extracted by the plaintiff. But if you believe from the evidence that the 18-foot level to the extent that it underlines blocks 4 and 9 were all extracted by the defendant, then you should return damages to the plaintiff for the value of the ore so extracted to be determined by the other instructions in this case.

32. In considering any ore extracted from Block 8, part of which was removed under the authority of this Court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed, you should make a deduction in accordance with the general rule laid down in the charge.

33. As to the Parks samples, taken in July, 1899, which form the basis of his evidence as to the value, I advise you that they are not in any sense to be treated by you as taken either by the consent or the procurement of the defendant; and any evidence as to inquiries by Parks or Philpotts, or any one else present, to such alleged inquiry, cannot give any such effect to them; but they stand as if no

such inquiries had been made, and are samples taken at the
199 sole instance of the plaintiff, and the defendant is in no manner bound by them, as it might by action of its own.

34. Where conflicting evidence is given, you should weigh it carefully and try to determine what was the fact. In doing so, you have the right to refuse to credit the testimony of any witness, if you believe that such witness was mistaken or had not the opportunity of determining or knowing the particular fact about which he has testified, or if you believe he has willfully testified falsely. The law gives you the right to determine the facts; it also clothes you with the power to determine the weight of testimony, and also to determine the credibility of all witnesses who have testified before you. You are not bound to take the testimony of any witness as being absolutely true unless you are firmly convinced that it is. When witnesses are otherwise worthy of belief and their testimony is conflicting, then the weight and credit should be given to those whose means of information were superior, and greater weight should be given to the testimony of witnesses who swear affirmatively to a fact, rather than those who swear to it negatively, and who show want of knowledge or recollection. You should endeavor in weighing the testimony given in this case, to harmonize the same, if it is susceptible of harmony.

WM. H. HUNT, *Judge.*

During the argument of respective counsel, the Court directed the attention of counsel of both sides to Rule No. 58 of the Rules
200 obtaining in this court, and particularly to an annotation in the margin of the rules entered in the Judge's copy of the rules, which marginal note reads as follows:

"Exceptions must be taken before the jury retire. Rule 58 is to be so construed.

Mountain Copper Company *vs.* Van Buren, 133 Fed. 2 Wallace, 339."

After delivering the charge, the Court, before the going out of the jury for the considering of their verdict, requested counsel to submit any exceptions they might have to the charge, and to the instructions requested and given or refused.

Thereupon, before the jury retired, counsel for both parties retired to the Judge's room with the charge of the Court, which was in writing, in their possession, and prepared in writing such objections and exceptions to the charge and the several parts thereof, and to the refusals to charge, as they desired, and thereafter in court the defendant presented the following exceptions and none other, which were then and there received by the Court, and signed and allowed before the jury retired.

Such exceptions are as follows, to wit:

[Title of Court, Title of Cause.]

Defendant's Exceptions to Charge.

The defendant, immediately after the Court had charged the jury and before they had left their seats or retired to consider
201 of their verdict, submitted in writing to the Court its objections and exceptions to the said charge, and portions thereof, which objections were then and there severally overruled, and defendant then and there duly excepted. The defendant also submitted in writing herein its objections and exceptions to the charges offered by the defendant and refused, which objections were likewise severally overruled and defendant then and there duly excepted.

Said objections and exceptions are respectively as follows, to wit:

1. To the refusal of the defendant's offered charge No. 1, because it correctly states the law and was not directly covered in the charge of the Court.

2. To the refusal of defendant's offered instruction No. 2, for the reason given in number one.

3. To the refusal of defendant's offered charge No. 3, for the reason as given in No. 1.

4. To the refusal of defendant's offered instruction No. 6, for the same reason as given in No. 1.

5. To the refusal of defendant's offered instruction No. 7, for the same reason as given in No. 1.

6. To the refusal of defendant's offered instruction No. 8, for the same reason as given in No. 1.

7. To the refusal of defendant's offered instruction No. 9, for the reason given in No. 1.

8. To the refusal of defendant's offered instruction No. 10, for the same reason given in No. 1.

9. To the refusal of defendant's offered instruction No. 11, for the same reason given in No. 1.

202 10. To the refusal of defendant's offered instruction No. 12, for the same reason given in No. 1.

11. To the refusal of defendant's offered instruction No. 13, for the reason given in No. 1.

12. To the refusal of defendant's offered instruction No. 14, for the same reason given in No. 1.

13. To the refusal of defendant's offered instruction No. 15, for the same reason given in No. 1.

14. To the refusal of defendant's offered instruction No. 16, for the same reason given in No. 1.

15. To the refusal of defendant's offered instruction No. 18, for the same reason given in No. 1.

16. To the refusal of defendant's offered instruction No. 19, for the same reason given in No. 1.

17. To the refusal of defendant's offered instruction No. 20, for the same reason given in No. 1.

18. To the refusal of defendant's offered instruction No. 21, for the same reason given in No. 1.

19. To the refusal of defendant's offered instruction No. 23, for the same reason given in No. 1.

20. To the refusal of defendant's offered instruction No 24, for the same reason given in No. 1.

21. To the refusal of defendant's offered instruction No. 25, for the same reason as given in No. 1.

22. To the refusal of defendant's offered instruction No. 26, for the same reason as given in No. 1.

23. To the refusal of defendant's offered instruction No. 27, for the same reason as given in No. 1.

24. To the refusal of defendant's offered instruction No. 28, for the same reason given in No. 1.

203 25. To the refusal of defendant's offered instruction No. 30, for the same reason as given in No. 1.

26. To the refusal of defendant's offered instruction No. 31, for the same reason as given in No. 1.

27. To the refusal of defendant's offered instruction No. 32, for the same reason as given in No. 1.

28. To the modification of defendant's offered instruction No. 36, for the reason that the modification incorrectly states the law, and the original instruction as offered does so correctly state it.

29. To the refusal of defendant's offered instruction No. 37, for the same reason given in No. 1.

30. To the refusal of defendant's offered instruction No. 38, for the same reason given in No. 1.

31. To the refusal of defendant's offered instruction No. 39, for the same reason given in No. 1.

32. To the refusal of defendant's offered instruction No. 40, for the same reason given in No. 1.

33. To the refusal of defendant's offered instruction No. 41, for the same reason given in No. 1.

34. To the refusal of defendant's offered instruction No. 42, for the reason that is given in No. 1.

35. To the refusal of defendant's offered instruction No. 44, for the same reason as given in No. 1.

36. To the refusal of defendant's offered instruction No. 46, for the same reason as given in No. 1.

37. To the refusal of defendant's offered instruction No. 47, for the same reason as given in No. 1.

38. To the refusal of defendant's offered instruction No. 49, for the same reason as given in No. 1.

204 39. To the refusal of defendant's offered instruction No. 50, for the same reason as given in No. 1.

40. To the refusal of defendant's offered instruction No. 53, for the same reason as given in No. 1.

41. To so much of charge No. 5 as says, that if plaintiff makes a *prima facie* case of extralateral rights for its discovery vein between the 520 and the 133-foot planes, then the defendant must show to the satisfaction of the jury that plaintiff has no such extralateral

rights, because (1) The burden of proof never shifts as to extralateral rights for discovery veins, and (2) whoever has the burden is only required to establish the fact by fair preponderance of the evidence and (3) that this charge does not correctly state the law.

42. To so much of charge No. 7 as says, that if plaintiff has extralateral rights on the discovery vein between the 520 and the 133-foot planes, it has extralateral rights on that part of the Drumlummon vein because (1) the same is not the law; (2) the Drumlummon, because entering and departing from the side lines of the St. Louis under the Court's charge can have no extralateral rights as a matter of law.

43. To so much of the same charge as says; if the discovery vein pas-es through the earth within the limits of the St. Louis surface boundary between the 520 and 133-foot planes, the plaintiff has extralateral rights, both to it and the Drumlummon vein between those planes, for the reason last given, and also because it gives extralateral rights though the discovery vein does not cut or pass through either end or side line.

205 44. The defendant excepts to so much of the preliminary part of the Court's charge as refuses to consider the estoppel pleaded in defendant's answer, for that it is the duty of the Court to instruct the jury as to the law governing estoppels, and to submit to the jury the determination of such questions of fact as are within the issues.

45. The defendant excepts to charge No. 5, for that it is contrary to law in that the burden of proof throughout is on the plaintiff, and does not shift as therein stated.

46. The defendant excepts to the instruction No. 7 for that the same is misleading and does not correctly state the law governing extralateral rights on by-veins.

47. The defendant excepts to the instruction No. 8, for that it is contrary to the law, in that no presumption whatever arises with reference to the course of the discovery vein.

48. The defendant excepts to the instruction No. 17, for that it is contrary to law, is not sufficiently guarded and is misleading to the jury.

49. Defendant excepts to the 18th instruction, for that it is contrary to law and does not correctly define what mining and milling expenses may be deducted.

50. Defendant excepts to the 19th instruction, given by the Court, for the reason that it does not correctly define the possession plaintiff must have in order to support an action for trespass, and is not applicable to the facts proven and conceded in this case.

51. Defendant excepts to the 20th instruction, for that
206 it is misleading, contrary to the law, and inapplicable to the facts.

52. Defendant excepts to the 21st instruction for that it is contrary to the law, and inapplicable to the facts, and further it instructs the jury to disregard the most valuable and satisfactory evidence in the case upon the question of damages.

53. Defendant excepts to the 22d instruction, for that it is contrary to law and misleading to the jury.

54. The defendant excepts to the 23d instruction, for that it is misleading, inapplicable to the evidence, and contrary to law.

55. The defendant excepts to the 26th instruction given by the Court, for the reason that the statutes of this state do not allow interest on unliquidated demands; that it is contrary to law, and inapplicable to the evidence.

56. The defendant excepts to the 32d instruction given by the Court, for the reason that the same is contrary to law and would require the defendant to surrender its contention that such ore justly belongs to it.

Notice of the foregoing exceptions are given by the defendant and are received and considered by the Court before the going out of the jury on this 6th day of July, 1905.

WILLIAM H. HUNT, *Judge.*

[Endorsed:] Title of Court and Title of Cause. Defendant's Exceptions to charge. Filed July 6th, 1905. Geo. W. Sproule, Clerk.

207 In defendant's proposed bill of exceptions, upon July 31, 1905, the defendant stated its exceptions to the charge given by the Court, in the following language:

"And thereupon and before the going out of the jury the defendant objected in writing to so much of the preliminary portion of the Court's charge as instructed the jury that the affirmative allegations contained in the defendant's answer were not important, and that for that reason no further reference would be made to them. For that the Court should have instructed the jury with reference to the law of estoppel, and that the judgment rendered in the specific performance case and the judgment-roll which the plaintiff itself had introduced in evidence, was an issue in said case, and that the judgment therein rendered was an absolute and conclusive bar to the right of plaintiff to recover for any and all ores mined and extracted from the said compromise ground, without reference to whether the apex of the Drumlummon vein in which said ores were so found was within the St. Louis claim, in whole or in part, and that as to all ores therein contained, they should not take the same into account in estimating plaintiff's damages.

But the Court then and there overruled such objection, to which ruling of the Court, and to the giving of said instruction the defendant then and there duly excepted.

The defendant likewise objected to the fifth instruction as given by the Court, for that the said instruction requires the defendant to show the course or strike and dip of plaintiff's discovery
208 vein, and the burden of proof to show the same was and is upon the plaintiff, and does not change as in said instruction stated.

And for the further reason that the strike and dip of plaintiff's discovery vein is not an issue under the pleadings in this case.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court, the defendant then and there duly excepted.

The defendant likewise objected to instruction number 8 for the reason that no presumption arises that the discovery vein of plaintiff's said discovery vein extended through the entire length of its location. And for the further reason that the burden of proof as to the strike or dip of the discovery vein is upon the plaintiff throughout and does not change to the defendant. And for the further reason that if the strike or dip of the discovery vein of plaintiff's said St. Louis claim was material, it should have been pleaded.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court to the giving of said instruction, the defendant then and there duly excepted.

And defendant objected to the 17th instruction, for the reason that the same was contrary to law and was misleading to the jury, and in effect instructed the jury to award damages to the plaintiff if they should find that it mined any ores within the area claimed by the plaintiff after the service of summons upon it, and the same would indicate a willful trespass on the part of the defendant,
209 and that it left out of consideration entirely the effect upon the defendant's mind of the affirmation by the Supreme Court of the United States, of the judgment in the specific performance case, which was absolutely conclusive of defendant's right to mine said ores within said disputed area.

But the Court overruled each and every of such objections and gave said instruction.

To which ruling of the Court and the giving of said instruction the defendant then and there duly excepted.

And defendant then and there duly objected to the 18th instruction given by the Court to the jury, for that it was contrary to law and did not correctly, or at all, define what mining or milling expenses the jury might reasonably deduct, should they find that the trespass was not a willful one.

But the Court overruled each and every of said objections and gave said instruction.

To which ruling of the Court the defendant then and there duly excepted.

Defendant objected to instruction numbered 19 given by the Court to the jury for the reason that it does not correctly define, or define at all, the possession the plaintiff must have of the premises from which the ore was mined in order to support an action for trespass, in that the evidence showed that all of the ore was mined within the ground covered by defendant's patent for its Nine Hour claim, and that by the Defendant's Exhibit "A," the judg-
210 ment in the specific performance case and the deed made in pursuance thereof, the defendant was entitled to all the ores found within the compromise ground, and the defendant could not have a possession sufficient to support an action of trespass for any ores found beyond, and to the eastward of said compromise ground.

But the Court overruled such objections and gave said instruction.

To which ruling of the Court the defendant then and there duly excepted.

The defendant likewise objected to the 20th instruction given by the Court to the jury for that it was misleading and contrary to law, and inapplicable to the facts. And for the reason that it instructed the jury not to consider the evidence on the part of the defendant with reference to value of the ore mined in the disputed area, but to be governed entirely by the evidence of the plaintiff in that regard.

But the Court overruled such objection and gave the said instruction.

To which ruling of the Court and the giving of said instruction the defendant then and there duly excepted.

And the defendant also objected to the 21st instruction given by the Court to the jury for that it was and is contrary to law and inapplicable to the facts as proven and it instructed the jury to disregard the most valuable and satisfactory evidence in the case with reference to value of the ores extracted in the disputed area.

But the Court overruled such objection and gave said instruction.

211 To which ruling of the Court and to the giving of said instruction, the defendant then and there duly excepted.

The defendant objected to the 23d instruction given by the Court to the jury, for that the same was misleading and inapplicable to the facts and contrary to law.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court the defendant then and there duly excepted.

The defendant objected to the 32d instruction given by the Court to the jury, for the reason that the same was and is contrary to law in that it would require the defendant to surrender its claim to be the owner of the ore in controversy as a condition to prevent the recovery of damages for the extraction in this case, and its surrender and return to the plaintiff in the injunction case, should the injunction case be decided in favor of the plaintiff. And for the further reason that the Court should have instructed the jury that it could not take into account such ores as it was satisfied from the evidence were being held by the defendant under such injunction order.

But the Court overruled such objection and gave said instruction to the jury.

To which ruling of the Court the defendant then and there duly excepted.

The Court declined to allow the exceptions as stated in the proposed bill of defendant, and directed that the bill incorporate

212 the exceptions and objections made and allowed before the jury retired, to which ruling of the Court the defendant then and there duly excepted.

Refused Instructions.

And the defendant before the commencement of the argument of the case to the jury, requested the Court to charge the jury in writing as follows, to wit:

"I. The defendant having heretofore and on or about the first day of June, A. D. 1905, recovered a judgment and decree against the above-named plaintiff in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, being the judgment and decree mentioned and set forth in the answer herein, and in evidence before you, and it not appearing from the testimony herein that said judgment, in so far as it awards all of the mineral contained in the compromise ground to the defendant herein has been, or was at any time modified, reversed or so restricted in its meaning as to apply only to such minerals as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said compromise ground, and it appearing further that in and by said judgment and decree the plaintiff herein was forever barred from all interest or claim to said compromise ground or to any part or portion thereof, or to the possession thereof, or of the minerals or any thereof. You are instructed that such judgment and decree absolutely concludes the plaintiff as to any and all minerals contained in said compromise ground,
213 whether the leads, lodes or veins wherein such mineral is found have or have not their apices within the surface boundaries of the plaintiff's St. Louis claim or otherwise, and as for all alleged trespasses in said compromise ground, you will not take the same into your consideration or return any verdict therefor."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give said instruction the defendant then and there excepted.

The defendant also at the time and place aforesaid requested the Court in writing to charge the jury as follows, to wit:

"II. The Court instructs you that in order to entitle a miner to follow a vein or lode having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of the top or apex within his surface boundaries. In this case, the plaintiff alleges that between what it denominates its 108 and 133-foot planes, it has only a part of the top or apex of the Drumlummon lode within its surface boundaries. The Court therefore instructs you that as between these two planes, plaintiff would not have the right to follow this vein on its dip, and you will disregard all testimony relating to ores mined on the dip of the vein between these two planes mentioned and denominated the 108 and the 133-foot planes."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give
214 the said instruction, the defendant then and there duly excepted.

The defendant likewise at the time and place aforesaid requested the Court in writing to charge the jury as follows, to wit:

"XII. It is alleged in the answer in this case that a judgment was duly rendered and given on or about the first day of June, A. D. 1905, in an action then pending in the District Court of the First Judicial District of the State of Montana, within and for the County of Lewis and Clarke, wherein the predecessor in interest of the defendant in this action was plaintiff, and the plaintiff herein was defendant. Whereby, it is claimed, that all of the mineral contained in the thirty-foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of plaintiff by its replication filed in this action, that such judgment was rendered, but it is alleged that it was confined to such mineral, and to such mineral only, as was or is found in leads or lodes having their tops or apices wholly within the surface boundaries of said compromise strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the compromise ground was distinctly in issue in that case, as appears by the pleadings, which are likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of plaintiff's right to recover,
for any and all ores which you may find that the defendant
215 has mined within the surface boundaries of the compromise
ground extended down vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff.

In pleading, that is an issue which is affirmed or alleged on one side and denied on the other. For example, if you find from the complaint in the specific performance case, which has here been introduced in evidence, that it was alleged that the plaintiff therein is the owner of all the mineral contained in the thirty-foot strip or compromise ground, and that the answer of defendant in that case, the plaintiff in this case denies that the plaintiff in the specific performance case was so the owner of such minerals or any thereof, then this was an issue in that case. The judgment in said case being for the plaintiff therein, the predecessor in interest of the defendant in this action, not only for the compromise strip but for all of the mineral therein contained, such judgment is absolutely conclusive upon these parties in this case, and the plaintiff herein is not entitled to recover a verdict at your hands for any ore found within the surface boundary of the compromise ground extended downward vertically. The judgment or decree in the specific performance case upon this question concludes the parties to that litigation, and constitutes a bar to this action so far as the mineral contained in the compromise ground is concerned."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give
216 said instruction the defendant then and there duly excepted.

The defendant likewise, at the time and place aforesaid, requested the Court in writing to charge the jury as follows, to wit:

"XVI. The section of the mineral land act which grants to the owner of a mining claim the right of extralateral pursuit of a vein having its top or apex within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or posssesor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of the claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis claim introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extralateral right on the Drumlummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim of defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extralateral rights, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drumlummon vein and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

But the Court would not and did not give said instruction, and marked the same refused,

217 To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise requested the Court in writing to charge the jury as follows, to wit:

"XIX. The burden of proof in this case is on the plaintiff, and unless you find from the preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, then your verdict should be for the defendant."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court, and to its refusal to give the said instruction, the defendant then and there duly excepted.

Defendant likewise at the time and place aforesaid requested the Court in writing to instruct the jury as follows, to wit:

"XXI. As I have already explained to you, plaintiff's extralateral right on the Drumlummon vein where the same is found within the surface boundaries of the St. Louis claim, is limited and controlled by the extralateral rights which you may find from the testimony it has, or would be entitled to, on its discovery vein, should that vein in its course downward on its dip extend to and under the surface boundary of the Nine Hour claim. The law does not contemplate that the owner of a mining claim should have a greater length of vein beneath the surface than it has length of apex of the vein

218 on the surface. For illustration, suppose that the plaintiff in this case had only one hundred feet of the apex of the St. Louis claim within the surface boundaries of its claim, and that it was so situated, with reference to the Nine Hour claim, that on its dip downward and under the surface of that claim it would have extralateral rights, then it would only be entitled to one hundred

feet in length along the course or strike of the vein in the Nine Hour claim.

"Applying these principles to the case at bar, the Court instructs you that if you should find from a preponderance of the testimony that the vein in the 65-foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental tunnel or fissure, then plaintiff's extralateral rights on the Drumlummon vein are controlled by the length of the discovery vein of the St. Louis claim and are practically coterminous therewith. To illustrate what I mean, suppose that you should find that at the northerly end of the discovery vein of the St. Louis it terminates practically at the end of the northeasterly drift driven by plaintiff from the bottom of its 65-foot shaft, then you would be authorized to draw an imaginary line from said point to the Drumlummon vein, at right angles to the general course or strike of said Drumlummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extralateral rights on the Drumlummon vein.

Then should you further find, from a preponderance of the
219 testimony, that plaintiff's discovery vein on its westerly course practically terminates at the Transcontinental tunnel or fissure, then a line drawn at right angles to the general course of the Drumlummon vein to such westerly point of termination of the St. Louis discovery vein will mark the termination of plaintiff's extralateral rights in said Drumlummon vein, no matter how much further to the southward the whole, or a part of the apex of the Drumlummon vein may be found within the St. Louis claim.

Walrath *vs.* Champeny Mining Co., 171 U. S. 297-308."

But the Court would not and did not give the said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

Defendant, as aforesaid, requested the Court in writing to instruct the jury as follows, to wit:

"XXII. If you should find from the testimony that the vein in the sixty-five-foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental tunnel, and that the vein found in the sixty-five-foot shaft passes through the fissure shown in the Transcontinental tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant unless the plaintiff has satisfied you by a preponderance of the evidence that such vein continues on its course through its St. Louis claim, and passes out of the south end line of its claim, or practically does so. If you should find from the
220 evidence that the fissure shown in the south side of the Transcontinental tunnel at a point a little westerly of the point where the vein from the sixty-five-foot shaft intersects said tunnel is the same fissure as that in which the vein in the sixty-five-foot tunnel is found, but that it only extends into the wall of the tunnel for a few feet, and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental tunnel as prac-

tically the southerly end of plaintiff's said discovery vein, and your verdict should be for the defendant."

But the Court would not and did not give the said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendnant as aforesaid requested the Court in writing to instruct the jury as follows, to wit:

"XXVI. The Court instructs you that your first duty is to examine and ascertain what, if any, extralateral rights attach to the discovery vein of plaintiff's St. Louis claim. In the first place, you must ascertain which of the surface lines, are, in law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them out on the ground, and named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practically parallel to the course of the discovery vein as it passes through the claim. For example, if you should find
221 from the evidence that the discovery vein of the St. Louis claim was in what has been denominated the 65-foot shaft, and that the vein therein discovered, on its course or strike through the claim, would pass out of the surface boundaries of the St. Louis between corners numbered one and two thereof, and that following said course in a southerly direction, it would pass out of the westerly boundary of said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this case would terminate, when you had found that fact. This is so because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which he first discovered, and upon which he made his location, was substantially parallel to the easterly boundary line of his claim, before you would be justified in awarding him extralateral rights on the Drumlummon vein, or on so much of it as has its apex inside the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis ground through the easterly boundary thereof, then, in whatever direction it might dip, it would not have extralateral rights within or under the Nine Hour claim, and extralateral rights could not be claimed for the Drumlummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled to all of the Drumlummon lode found within their surface boundaries, but they could not pursue it on its dip an inch beyond the easterly line of the St. Louis claim, extended
222 downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him extralateral rights under the Nine Hour claim, it is plaintiff's misfortune, and one which neither this Court nor this jury can correct. Mr. Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made. He should have staked his claim along the strike of the vein, and not across it.

Walrath *vs.* Champion Mining Co., 171 U. S. 297-308."

But the Court would not and did not give such instruction and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise at the time and place aforesaid requested the Court to instruct the jury as follows, to wit:

"XXVIII. It conclusively appears by the testimony in this case that it is an undisputed fact that the Compromise ground, or the thirty-foot strip, as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode Mining Claim.

The Court therefore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis claim was first located and first patented, having been patented as a part of the St. Louis, the Compromise ground is to be regarded as
223 standing exactly on the same plane, so far as priority is concerned, with every other part of the St. Louis claim."

But the Court would not and did not give said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise requested the Court in writing to instruct the jury as follows, to wit:

"XXXI. Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterward deeded to the defendant company or its predecessor, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour does not involve any admission on the part of the defendant that the portion of the St. Louis claim outside of the compromise strip is prior in right or time to said strip. In a case where there is equality and not priority of right or location, and the hanging and foot-walls of the vein cross the different points, the width of the vein must be equally divided; and so, in this case, the plane would be drawn at the 120½-foot or half way between the 108-foot and the 133-foot plane, and there could be no recovery by the plaintiff except for ores shown
224 by the evidence to have been extracted north of this 120½-foot plane; and if as to any block or blocks or areas of extraction, the evidence leaves it doubtful as to whether any of it, or if any, how much of it was extracted north of the 120½-foot plane, you must treat that block or those blocks as having been extracted south rather than north of that plane, and there could be no recovery therefor, for the burden is on the plaintiff to show by a fair preponderance of the evidence what it is entitled to recover."

But the Court would not and did not give the said instruction, and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

The defendant likewise requested the Court in writing to instruct the jury as follows, to wit.

"XXXII. Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterwards deeded to the defendant company or its predecessors, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour, does not involve any admission on the part of the defendant that the portion of the St. Louis claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not
225 priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action, did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis company to follow the vein to depth in this action must be limited by what is called the 108-foot plane, or the departure point of the hanging-wall and that there can be no recovery in this case for any ores extracted south of the 108-foot plane."

But the Court would not and did not give the said instruction and marked the same refused.

To which ruling of the Court and to its refusal to give the said instruction, the defendant then and there duly excepted.

And the defendant prays that this, its bill of exceptions to the errors aforesaid, may be signed, sealed and made a part of the record, which is done accordingly this 14th day of August, A. D. 1905.

WILLIAM H. HUNT, *Judge.*

Service by copy is hereby acknowledged this 15th day of August, 1905.

M. S. GUNN,
J. B. CLAYBERG,
BACH & WRIGHT, AND
ARTHUR BROWN,
Attorneys for Plaintiff.

[Endorsed:] Title of Court and Cause. Bill of Exceptions. Filed August 15th, 1905. Geo. W. Sproule, Clerk.

226 And thereafter, to wit, on the 21st day of August, A. D. 1905, the defendant filed its assignment of errors herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Assignment of Errors.

Come now, the defendant, the Montana Mining Company, Limited, plaintiff in error, by Messrs. W. E. Cullen, Wm. Wallace, Jr., and W. E. Cullen, Jr., its attorneys, and says that the record and proceedings in the above-entitled case show there is manifest error in this, to wit:

I.

The witness, Wm. Mayger, having testified that the original location of the St. Louis Lode was at the point marked on the map (Plaintiff's Exhibit No. 1) as the 65-foot shaft and that a vein was connected with that original discovery.

Whereupon the witness was asked the following question:

Q. "Which direction does it run?

227 To which said question the defendant objected on the ground that the same was irrelevant and immaterial, and the Court erred in overruling said objection for that the direction or strike of the discovery vein was not in issue, there being no allegation in the complaint relating to the strike or dip of the discovery vein.

II.

The Court erred in permitting the witness William Mayger to testify as to the ground which had been stoped out by the defendant northerly of the 133-foot plane, and to point the same out to the jury on the map (Plaintiff's Exhibit No. 1). The witness having testified that the ground between the planes, from the surface down to the 190-foot level of the Montana company, had been stoped out by the defendant, was asked this question, to wit:

Q. "Point out to the jury westerly of the 133-foot plane where the stopes have been taken out?" To which question the defendant objected.

For the reason that the same was and is irrelevant and immaterial, because the stoping he was so required to testify about, was between plaintiff's 133 and 108-foot planes as shown on this map (Plaintiff's Exhibit No. 1), and between said points the plaintiff did not have the whole of the apex of the said Drumlummon vein within the surface lines of its claim, and it had no right to take the said vein on its strike beyond the west line of the Compromise ground, or to take any portion of the surface of said Com-

228 promise gr-und, and the Court erred in admitting in evidence over defendant's objection testimony as follows:

(*a*) In permitting the witness, William Mayger, to testify, as follows: "The entire vein is stoped out between the 108 and 133-foot planes, from the surface to the 190-foot level of the Montana company's works."

(*b*) In permitting the witness, Parks, to testify as follows: "I have block No. 1, the stope south of the north line of the Montana company's apex shaft, to the 133-foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the Compromise ground extended downward vertically. The block has an average width of 7 feet, is 21 feet long and 36.3 feet high."

Also the testimony of said witness, as shown by the record with reference to blocks 2, 3, 5, 6 and 7, all of which lie wholly within the Compromise ground, and between plaintiff's so-called 108 and 133-foot planes.

III.

The Court erred in admitting evidence, over defendant's objection, of the strike and dip of plaintiff's discovery vein as follows, to wit:

(*a*) In permitting the witness, Wm. Mayger, to testify that the St. Louis Discovery Vein, ran very nearly parallel with the side lines of the St. Louis, as staked; that it dipped to the east; that they had traced it to within 95 feet of the end line at the south end, and within 400 feet of the north end.

(*b*) In permitting the witness, Walter Proctor Jenny, to
229 testify as follows: "I have examined the discovery vein of the St. Louis Lode Mining Claim. Its course is substantially northeast and southwest. Explorations underground show that it lies within 750 feet of the north end line, and in the south end it is traced to within 95 feet of the end line. The dip of the vein is from vertically to a dip of 85° to 90/ easterly."

(*c*) In permitting the witness, John R. Parks, to testify as follows, to wit: "The discovery vein of the St. Louis is a gold-bearing fissure vein, running in the general direction of the side lines. The vein is developed both northerly and southerly from the Transcontinental tunnel."

(*d*) In the admission of all other testimony, shown in the record relative to the discovery vein of plaintiff's St. Louis Mining Claim, all of such testimony having been admitted over defendant's objections.

IV.

The Court erred in admitting all testimony as shown by the record, relating to ores mined by the defendant in the compromise ground, for the reason that the plaintiff was estopped by the judgment in the Specific Performance case from claiming any ore or mineral found within the surface boundaries of said compromise ground, and, particularly the Court erred in permitting the witness, William Mayger, to testify, over defendant's objection, that "The entire vein is stoped out between the 108 and 133-foot planes, from the surface to the 190-foot level of the Montana Company's

works. I had Professor Parks and Mr. Keerl measure up
230 the stopes taken out by the defendant, and compute the number of tons that had been so taken."

(*b*) In admitting the testimony of Joseph Wallish over defendant's objection as follows: "I have heard the testimony of Mr. Parks, and heard him speak of testing certain samples. I was present when those samples were taken. The first sample was taken in the Montana company's apex shaft; it was taken from the northeasterly portion of the shaft."

(*c*) In admitting the testimony of John R. Parks, over defendant's objection, and permitting him to testify as follows: "I have block No. 1, the stope south of the north line of the Montana company's apex shaft, to the 133-foot plane, and from the surface to the instrument at K. It lies entirely within the boundaries of the compromise ground extended downward vertically."

V.

The witness, William Mayger, having testified that the plaintiff had workmen on the south end of its St. Louis Claim, on Saturday, the 29th day of May, 1905, developing the foot-wall of the vein, was asked on cross-examination this question, to wit:

"If that man were at work 78 feet below corner No. 3, and there had been no foot-wall there, will you tell me the width of that apex provided the hanging-wall took the course you indicated by your ruler from the 108-foot plane crossing through the Nine Hour shaft?"

Which question was objected to by the plaintiff, and the Court erred in sustaining such objection, for the reason that the
231 same was proper cross-examination as tending to develop the knowledge of the witness and his interest in the litigation.

VI.

The Court erred in admitting in evidence a certain map of the St. Louis Mining Claim, and in permitting blue print copies of the same to be given to each of the jurors. The only authentication of said map being that the witness William Mayger on his redirect, upon being shown the map by counsel, testified that generally speaking it represented as far he knew anything about it, the general situation, but that he did not know who prepared the map or the map of which it was a copy. That it was a fair enough illustration except that according to his idea, there was not so much throw of the discovery vein on the fault line, and that the two ends ought to be nearer together and that a line ought to be a little bit higher up, otherwise it was all right.

VII.

The Court erred in permitting the witness William Mayger to answer the following question relating to said map, to wit:

Q. "I will ask you if that bears a general resemblance of the

general situation of the Drumlummon Mining Claim to the rest of the property?"

For that the question was leading, immaterial and irrelevant.

VIII.

The Court erred in admission of evidence offered by the plaintiff in the following instances, to wit:

232 (1.) The witness John R. Parks, having testified that himself and Mr. Keerl made a careful survey of the ground and accurately measured all of the stopes and cavities from which ore had been removed, was permitted to testify over defendant's objection as to ore removed between the 108 and the 133-foot planes and ore lying wholly within the surface boundaries of the Compromise Ground.

(2.) The said witness having testified that he had divided the stoped ground into eleven blocks lying north of the 133-foot plane down to the 190-foot level in the defendant's ground, was required to take the blocks and tell the tonnage and value he found in each block over the objection of the defendant. For that it included blocks in the Compromise ground, which by the judgment and decree in the Specific Performance case, was found to be the property of the defendant, and because they were not within the recovery period under the pleadings in the action, in that a portion thereof at least was taken out since September 16th, 1893, and also because the recovery for ore extracted after September 16th, 1893, is limited by the supplemental pleading.

(3.) The Court erred in permitting the witness Parks to testify to what he denominated Block one being the ground south of the north line of the Montana company's apex shaft to the 133-foot plane from the surface to the instrument at K. and containing 410½ tons of the value of $59,522.50.

233 (4.) The Court erred in admitting the said witness Parks to testify with reference to the cubical contents and value of each of the blocks, numbered 2, 3, 4, 5, 6, 7, 8, 9 and 10, for the reason already assigned.

IX.

The Court erred in not permitting the witness for the defendant, John H. Farmer, to answer the following question, to wit:

Q. "Drawing a line at right angles to that one (indicating the east line of the Compromise ground) 50 feet from the center of the discovery shaft on the Nine Hour, where would it bring it on the map, that is from the center of the discovery shaft on the Nine Hour and at right angles to the line between corners 2 and 3 on the St. Louis?"

Said witness having testified that he was a mining engineer and had made the map (Defendant's Exhibit "E") about which he was testifying.

X.

The Court erred in refusing to permit the witness- John Langan, William Robinson, Warren De Camp, F. P. Sterling, John W. Eddy and Joseph K. Toole to be called to the stand, and in requiring the defendant to submit to the court in an offer of proof what it expected to establish by the testimony of each of said witnesses severally.

XI.

The Court erred in refusing to permit the defendant to call to the witness-stand, John H. Farmer and to prove by him that he had read the complaint in the Adverse Claim suit, brought by
234 the owners of the Nine Hour against the St. Louis claim, which complaint is referred to in the complaint in the Specific Performance case; that he knew the description therein contained and that it represented the area of 1.98 acres. That he had platted the area in conflict on the map (Defendant's Exhibit "E") and that it included the 30-foot strip or the Compromise ground.

XII.

The Court erred in sustaining the objection made by plaintiff and in refusing to permit the defendant to prove by the witness William Robinson, present in court, that he was the person who located the Nine Hour Claim and the representative of his co-owner when the settlement of the Adverse Suit was made. That the whole area in conflict in that suit was 1.98 acres, the boundaries of which were accurately shown upon the map (Defendant's Exhibit "E"); and that all of the strip described in the bond was the easterly 30 feet of said 1.98 acres. That the instructions he received with reference to the settlement of said Adverse Claim suit from his co-owner De Camp, was that he was to retain the right to the ore beneath the Compromise ground without regard to where the apex of the lode was, in which said ore might be contained. That it was arranged with William Mayger representing Charles Mayger, that the Nine Hour claimants were to have the 30-foot strip and, "All of the mineral therein contained" without regard to where the apex of the lode might be in which such mineral was contained. That this was the distinct understanding of the parties before the bond (De-
235 fendant's Exhibit "A") attached to its answer was drawn up. That said bond was drawn up by Messrs. Toole & Toole, who were the attorneys for William Mayger. That the witness, after said bond was drawn up, went to Joseph K. Toole with said bond and inquired of him whether the obligor in said bond could pay the penal sum named therein and avoid making conveyance of the said premises, and whether by its terms the bond gave to witness and his co-owner all of the mineral contained in said Compromise ground regardless of where the lead in which it was found might have its apex. That he knew where the east side line of the St. Louis Lode Mining Claim was prior to the time that he staked his Nine Hour Claim, and that the westerly line of the Nine Hour Claim was not within 25 feet on the south end and 50 feet on the north end of said

St. Louis east side line. That after his discovery, the southeast corner stake of the St. Louis was moved up to a point near the east side line of his Nine Hour Claim, which point is correctly shown on defendant's map (Exhibit "E"). That when the St. Louis was surveyed for patent, such survey was started from its northeast corner stake and ran in the direction of the stake which had been moved to the point marked corner No. 2 on its survey, where a monument was put up, where no stake or monument had ever stood before, from which point the said side line had an angle to its corner No. 3. That the extension of said east side line of said St. Louis Claim over witness' Nine Hour Claim was wrongful and resulted in securing as a part of said St. Louis Mining Claim all of the area of said
236 Nine Hour Claim embraced within said line, save and except the 30-foot strip.

XIII.

The Court erred in refusing to permit the defendant to call Warren De Camp and to establish by him that he was a co-owner in the Nine Hour Claim at the time that the Adverse Claim suit was pending; that he knew the settlement that was made and that he would not have consented thereto, but for the fact that the owners of the Nine Hour were to have the 30-foot strip, together with all of its mineral contents regardless of where the apex of the lode in which such mineral so found, might be. That he knew of the wrongful extension of the east side line of the St. Louis over the Nine Hour, made at the time of the survey for patent of said claim. That he knew where the east line of the St. Louis was as originally staked, and the west line of the Nine Hour as that claim was staked, and that there was an interval of unclaimed territory between the two lines.

XIV.

The Court also erred in sustaining plaintiff's objection to calling Frank P. Sterling, then in court, to the witness-stand and in refusing to permit the said defendant to prove by said Sterling that at the time (Defendant's Exhibit "A") attached to defendant's answer herein was drawn, he was a lawyer, was interested in said Nine Hour Claim as a co-owner, that he understood the law of apex rights, that it was distinctly understood and agreed between
237 the owners of the Nine Hour and of the owner of the St. Louis at the time said bond was made, that the owners of the Nine Hour should own all of the mineral contained in said 30-foot strip or Compromise ground, and that the owner or owners of the St. Louis, should not have the right to follow into such ground any lead, lode, ledge or vein having its apex within the surface boundaries of the St. Louis Claim. That the witness, William Robinson, after said bond had been drawn up, took it to Governor Joseph K. Toole to learn whether it relieved the ground known as the Compromise ground from the apex rights of the St. Louis Claim adjoining it. And that he, said Robinson, would not accept said bond until he had been so assured of said fact.

XV.

The Court erred in sustaining the objection made by the plaintiff to defendant's offer to prove by the witness John W. Eddy, that he was a co-owner in the Nine Hour Claim at the time of the settlement of the Adverse suit. That it was the distinct understanding between all of the parties to that settlement, that the Compromise ground was to be a piece of ground whose westerly line should be parallel to the lines of the St. Louis between corners numbered 2 and 3 and 50 feet distant from the center of the Nine Hour Discovery shaft. That no settlement or agreement would have been entered into by the obligees named in the said bond; but for the fact that the said obligees were to have all of the mineral contained in said ground without regard to where the apex of the vein might be in which such minerals were found.

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XVI.

The Court also erred in sustaining the objection made by the plaintiff to the calling of John Langan, then in court, to the witness-stand, and in sustaining its objection made to the offer of defendant to prove by said witness that he knew where the east line of the St. Louis Claim was originally located, and where the west line of the Nine Hour was located, and that he knew that there was a vacant space of unclaimed ground between the two lines. That he knew that the easterly line of the St. Louis was wrongfully extended over the Nine Hour.

XVII.

The Court erred in refusing upon objection of plaintiff to permit the defendant to call Joseph K. Toole and in rejecting its offer to prove by said witness that the bond for a deed (Defendant's Exhibit "A") attached to its answer, was in his handwriting; that the words, "Together with all the mineral therein contained," were inserted therein because that was the agreement of the parties at the time that said bond was drawn.

XVIII.

The Court erred in refusing to receive the original bond (Defendant's Exhibit "A") attached to its answer, in evidence, the defendant offering to show that said bond was in the handwriting of Governor Joseph K. Toole, who witnessed the instrument.

XIX.

The Court erred in refusing to permit defendant to read in
239 evidence the original complaint, and the replication in case No. 2798, Old Series of the records of the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis & Clarke, wherein William Robinson, *et al.*, were plaintiffs and Charles F. Mayger was defendant, being the Adverse Claim Suit referred to in the record in the Specific Perform-

ance Case, for the purpose of showing that the area involved was the 1.98 acres testified to as shown upon (Defendant's Exhibit "E").

XX.

The Court erred in granting the plaintiff permission to amend the *ad damnum* clause of its complaint so as to change the $50,000 therein mentioned to $400,000. Such amendment not being necessary in order to make the pleadings correspond with the proof, and the same depriving the defendant of substantial rights.

XXI.

The Court erred in overruling and denying defendant's motion to direct a verdict in its favor.

XXII.

The Court erred in its charge to the jury in telling them in the preliminary portion of its charge that, "defendant's answer then contains affirmative allegations which are not important in this trial and therefore no further reference is made thereto."

XXIII.

The Court erred in its charge in giving to the jury its
240 instruction numbered 5, which said instruction is as follows, to wit:

"The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and the 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

XXIV.

The Court erred in charging the jury as in its instruction No. 8, which said instruction is as follows, to wit:

"If you find that the course of strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or elsewhere is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location. And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extralateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis Claim, between the 520 and the 133-foot planes, that the discovery vein of the St. Louis Claim

should pass through either end line of said claim, but it is
241 sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis Claim between said planes generally lengthwise of the claim."

XXV.

The Court erred in its charge to the jury in giving its instruction No. 17, which is as follows, to wit:

"If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use quartz, rock and ore, within the planes belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injury it has sustained."

XXVI.

The court erred in its charge to the jury in giving to the jury its instruction No. 18, which said instruction is as follows, to wit:

"The defendant, even if an innocent trespasser, is not en-
242 titled to claim any mitigation of damages for the moneys expended in the running of levels, sinking of shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant, or any salaries paid to its officers, or any wages to any person, except those actually employed and engaged in the extraction, transportation and milling of the ores in question."

XXVII.

The Court erred in its charge to the jury in giving its instruction No. 19, which is as follows, to wit:

"When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such a vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it was a

trespass upon said claim within its surface boundaries. And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest
243 intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis Claim and the ore extracted therefrom."

XXVIII.

The Court erred in its charge to the jury in giving to said jury its 20th instruction, which is as follows, to wit:

"If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and the 133-foot planes, and the value thereof, and that it did not do so, but took away from the plaintiff the means of proving the true and correct amount and value thereof, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by the misconduct of defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find from the facts as above indicated, you are at liberty to follow the evidence given in behalf of the plaintiff, as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence."

XXIX.

The Court erred in its charge to the jury in giving to said jury its 21st instruction, which is as follows, to wit:

"As to the evidence disclosed by the books of defendant and the abstract thereof, offered in evidence in behalf of defendant, I charge you that to entitle them to be considered as sufficient evidence
244 to prove the value of the ore extracted from the Drumlummon vein, you must be satisfied that the ore taken from other parts of the defendant's mine, which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition."

XXX.

The Court erred in giving to the jury its 23d instruction, which is as follows, to wit:

"The law is well settled that if one willfully places the property of another in a situation where it cannot be recovered, or its true amount or value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value of which the property in question can be reasonably estimated."

XXXI.

The Court erred in its charge to the jury by giving to the jury its instruction No. 32, which is as follows, to wit:

"In considering any ore extracted from Block 8, part of which was removed under the authority of this Court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were
245 offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed you should make a deduction in accordance with the general rules laid down in the charge."

XXXII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. 1.

"The defendant having heretofore and on or about the 1st day of June, A. D. 1895, recovered a judgment and decree against the above-named plaintiff in the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke, being the judgment and decree mentioned and set forth in the answer herein and in the evidence before you. And it not appearing from the testimony herein, that said judgment, in so far as it awards all of the mineral contained in the Compromise ground to the defendant herein, has been, or was at any time modified, reversed or so restricted in its meaning, as to apply only to such mineral as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said Compromise ground, and, it appearing further, that in and by said judgment and decree, the plaintiff herein was forever barred from all interest or claim to said Compromise ground, or to any part or portion thereof or to the possession thereof, or, of the mineral or any thereof. You are instructed that such judgment and
246 decree absolutely concludes the plaintiff as to any and all mineral contained in said Compromise ground, whether the leads, lodes or veins wherein such mineral is found, have, or have not their apices within the surface boundaries of the plaintiff's St. Louis Claim or otherwise, and as for all alleged trespasses in said Compromise ground, you will not take the same into your consideration or return any verdict therefor.

The Court instructs you that in order to entitle a miner to follow a vein or lode, having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of such top or apex within his surface boundaries. In this case, the plaintiff alleges that between what it denominates its 108 and 133-foot planes, it has only a part of the top or apex of the Drumlummon Lode within its surface boundaries. The Court therefore instructs you that as between these two planes, the plaintiff would not have the right

to follow this vein on its dip, and you will disregard all testimony relating to ores mined on the dip of the vein between these two planes mentioned and denominated the 108 and the 133-foot planes."

XXXIII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. II, which said instruction is as follows, to wit:

"It appearing that in and by the bond for a deed, a copy whereof is annexed to the defendant's answer herein, and by the judgment rendered on or about June 1st, 1895, in the District Court of the First Judicial District of the State of Montana, in and for the
247 county of Lewis & Clarke, in an action wherein the predecessor in interest of the defendant herein was plaintiff and the plaintiff herein was defendant, the plaintiff herein was precluded from asserting any right, title, or interest in and to the Compromise ground, or to any and all mineral therein contained, the said plaintiff had neither the actual nor constructive possession of the ground in which the trespasses complained of are alleged to have been committed and is, therefore not entitled to recover in this action. You are therefore instructed to return a verdict for the defendant."

XXXIV.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XII, which said instruction is as follows, to wit:

"It is alleged in the answer in this case that a judgment was duly rendered and given on or about the 1st day of June, A. D. 1895, in an action then pending in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis & Clarke, wherein the predecessor in interest of the defendant in this action was plaintiff and the plaintiff herein was defendant. Whereby, it is claimed, that all of the mineral contained in the thirty-foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of the plaintiff by its replication filed in this action, that such judgment was rendered, but, it is alleged that it was confined to such mineral, and such mineral only, as was or is found in leads or lodes having their tops or apices wholly within the
248 surface boundaries of the said Compromise strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the Compromise ground was distinctly in issue in that case, as appears by the pleadings, which are likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of the plaintiff's right to recover, for any and all ores which you may find that the defendant has mined within the surface boundaries of the Compromise ground extended downward vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff."

XXXV.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XVI, which said instruction is as follows, to wit:

"The section of the Mineral Land Act which grants to the owner of a mining claim the right of extralateral pursuit of a vein having its top or apex within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course, beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis Claim, introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extralateral right on the
249 Drumlummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim of the defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extralateral right, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drumlummon vein, and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

XXXVI.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XIX, which said instruction is as follows, to wit:

"The burden of proof in this case is on the plaintiff, and unless you find from a preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, than your verdict should be for the defendant."

XXXVII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXI, which said instruction is as follows, to wit:

"As I have already explained to you, plaintiff's extralateral rights on the Drumlummon vein, where the same is found within surface boundaries of its St. Louis Claim, is limited and controlled by the extralateral rights which you may find from the testimony it has, or would be entitled to on its discovery vein, should that
250 vein in its course downward on its dip extend to and under the surface boundaries of the Nine Hour Claim. The law does not contemplate that the owner of a mining claim shall have a greater length of vein beneath the surface than he has length of apex of the vein on the surface. For illustration, suppose that the plaintiff in this case, had only one hundred feet of the apex of its St. Louis Claim within the surface boundaries of its claim, and that it was so

situated, with reference to the Nine Hour Claim, that on its dip downward and under the surface of that claim it would have extralateral rights; then it would only be entitled to one hundred feet in length along the course or strike of the vein in the Nine Hour Claim.

Applying these principles to the case at bar, the Court instructs you that if you should find from a preponderance of the testimony that the vein in the sixty-five-foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis Claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental tunnel or fissure, then plaintiff's extralateral rights on the Drumlummon vein are controlled by the length of the discovery vein of the St. Louis Claim and are practically coterminous therewith. To illustrate what I mean, suppose you should find that at the northerly end of the discovery vein of the St. Louis, it terminates practically at the end of the northeasterly drift driven by plaintiff from the bottom of its sixty-five-foot shaft, then you would be authorized to draw an imaginary line from said point to the Drumlummon vein, at right angles to the general course or strike
251 of said Drumlummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extralateral rights on the Drumlummon vein. Then should you further find, from a preponderance of the testimony, that plaintiff's discovery vein on its westerly course practically terminates at the Transcontinental tunnel or fissure, then a line drawn at right angles to the general course of the Drumlummon vein to such westerly point of termination of the St. Louis discovery vein, will mark the termination of plaintiff's extralateral rights in said Drumlummon vein, no matter how much further to the southward the whole, or a part of the apex of the Drumlummon vein may be found within the St. Louis Claim."

XXXVIII.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXIII, which said instruction is as follows, to wit:

"If you should find from the testimony that the vein in the sixty-five-foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental tunnel, and that the vein found in the sixty-five-foot shaft passes through the fissure shown in the Transcontinental tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence, that such vein continues on its course through its St. Louis Claim, and passes out of the south end
252 line of its claim, or practically does so. If you should find from the evidence that the fissure shown in the south side of the Transcontinental tunnel at a point a little westerly of the point where the vein from the sixty-five-foot shaft intersects said tunnel is the same fissure as that in which the vein in the sixty-five-foot drift is found, but that it only extends into the wall of the tunnel for a few

feet and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental tunnel as practically the southerly end of plaintiff's said discovery vein, and your verdict should be for the defendant."

XXXIX.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXVI, which said instruction is as follows, to wit:

"The Court instructs you that your first duty is to examine and ascertain what, if any extralateral rights attach to the discovery vein of plaintiff's St. Louis Claim. In the first place you must ascertain which of the surface lines, are, in law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them out on the ground, or named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practically parallel to the course of the discovery vein as it passes through the claim. For example, if you should find from the evidence that the discovery vein of the St. Louis Claim was in what has been denominated the 65-foot shaft, and that the vein therein dis-
253 covered, on its course or strike through the claim, would pass out of the surface boundaries of the St. Louis, between corners numbered one and two thereof, and that following said course in a southwesterly direction, it would pass out of the westerly boundary of the said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this cause would terminate, when you had found that fact. This is so, because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which he first discovered, and upon which he made his location, was substantially parallel to the easterly boundary line of his claim, before you would be justified in awarding him extralateral rights of the Drumlummon vein, or on so much of it as has its apex inside the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis ground through the easterly boundary thereof, then, in whatever direction it might dip, it would not have extralateral rights within or under the Nine Hour Claim, and extralateral rights could not be claimed for the Drumlummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled to all of the Drumlummon lode found within their surface boundaries, but they could not pursue on its dip an inch beyond the easterly line of the St. Louis claim, extended downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him
254 extralateral rights under the Nine Hour Claim, it is plaintiff's misfortune, and one which neither this Court nor this jury can correct. Mr. Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made.

He should have staked his claim along the strike of the vein, and not across it."

XL.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXVIII, which said instruction is as follows, to wit:

"It conclusively appears by the testimony in this case, and it is an undisputed fact that the Compromise ground or the 30-foot strip, as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode Mining Claim. The Court therefore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis Claim was first located and first patented. Having been patented as a part of the St. Louis, the Compromise ground is to be regarded as standing exactly on the same plane, so far as priority is concerned, with every other part of the St. Louis Claim."

XLI.

The Court erred in refusing to instruct the jury as requested by the defendant in its instruction No. XXXII, which said instruction is as follows, to wit:

"Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterward deeded
255 to the defendant company or its predecessor, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis Claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour, does not involve any admission on the part of the defendant that the portion of the St. Louis Claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action, did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis company to follow the vein to depth in this action must be limited by what is called the 108-foot plane, or the departure point of the hanging-wall and that there can be no recovery in this case for any ores extracted south of the 108-foot plane."

XLII.

The Court erred in giving to the jury its instruction No. 7, which said instruction is as follows, to wit:

"It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis quartz lode mining claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence; but

the defendant insists that the St. Louis quartz lode mining
256 claim is not entitled to extralateral rights on the Drumlummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary or incidental vein of the St. Louis Claim. Under the Statutes of the United States, the locators of a mining claim have the exclusive right of possession and enjoyment of all the surface included within the lines of their location and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes of ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. These extralateral rights, under the decisions of the Supreme Court of the United States, as to the secondary or incidental veins, are the same as those given by the statute upon original or discovery veins; and if, therefore, plaintiff had extralateral rights upon its discovery vein, including that portion of the St. Louis Claim within the above planes in which is found the apex of the Drumlummon vein, so called, then plaintiff has extralateral rights upon that part of the Drumlummon vein. Plaintiff claims that the original or discovery vein of the St. Louis Claim runs through the earth beneath the surface of said claim in the general course of the side lines of said claims. If you find from the evidence that the original or discovery vein of the St. Louis Claim, on its course or strike,
pases through the earth within the limits of its surface boun-
257 daries, between the 520 and the 133-foot planes, on a general course lengthwise of the claim, then plaintiff has extralateral rights to such parts of the original discovery vein between said planes, and would have corresponding extralateral rights upon any secondary or incidental veins having their apexes in the St. Louis Claim betwen said planes.

XLIII.

The Court erred in giving to the jury its instruction No. 9, which said instruction is as follows, to wit:

"And if you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) run lengthwise of the St. Louis Claim between its side lines and extend from the 520 to the 133-foot planes, and dip easterly, then plaintiff would be entitled to extralateral rights for that vein (or those veins) and to the like extralateral rights for all other veins having their apices within the same limits, and running in the same general direction."

XLIV.

The Court erred in giving to the jury its instruction No. 11, which said instruction is as follows, to wit:

"There are two rules established and adopted by the Federal and other courts of the United States with reference to the measure of damages in cases of this kind, and which rule applies, depends upon

whether or not the trespass under which the ore was extracted, was willfully committed or done in good faith. If you find from the evidence that the defendant entered on that part of the said Drum-
lummon vein which apexes in the St. Louis quartz lode
258 mining claim, between the planes aforesaid, and extracted the said ore therefrom willfully, recklessly and with knowledge that said vein did apex within the said St. Louis Claim, then your verdict must be for the value of the ore which you must determine from the evidence introduced. If, however, the defendant had sufficient reason to believe, and did honestly believe at the time it entered upon said vein and extracted and removed said ore, that the same belonged to said defendant and not to the plaintiff, and that it had lawful right and authority to extract and remove the same, then the trespass was not willful and the plaintiff is entitled to the value of the ore, subject to the deduction for the reasonable cost of mining of said ore, hoisting the same to the surface, transporting the same to reduction works and the reasonable cost of such reduction. The actual cost to the defendant of all, or any of those items is not conclusive upon the value thereof. Defendant is not entitled to reduce the value of the ore by any sum greater than the reasonable value of the items above mentioned, and you must determine such reasonable value from the evidence given in the case. In determining the character of the trespass, you have the right to disregard all testimony given by the defendant tending to establish good faith, if, in your judgment, the action of the defendant discloses to your satisfaction that the claim of defendant, that it acted under an honest belief that it owned the ore in question and had a right to remove it, was merely for the purpose of reducing the damages which it would
have to pay for such ore upon a suit to recover the value
259 thereof by this plaintiff, and find that the action of defendant in extracting and removing the ore in question was willful."

XLV.

The Court erred in giving to the jury its instruction No. 14, which said instruction is as follows, to wit:

"The burden of proof is upon the plaintiff to show by a preponderance of evidence, its ownership, the amount of ore extracted and its value; and in arriving at a verdict, you are to take into consideration all of the circumstances and facts presented by the evidence in the case. However, if you are satisfied that the plaintiff has shown its ownership, and given evidence tending to show the amount of ore extracted and the value thereof, the burden is upon the defendant to show if it can, that the trespass complained of was not willful. A presumption arises from the extraction of the ore from a vein which has its apex within the plaintiff's mining claim, by the defendant, that the trespass was willful and that the defendant is liable for the value of the ore taken from the mine. This presumption is, however, disputable, and the burden is upon the defendant to show in mitigation of damages that it was not a willful trespasser and thus be relieved from payment of the value of the ore as stated in other instructions herewith given to you."

XLVI.

The Court erred in giving to the jury its instruction No. 15, which said instruction is as follows, to wit:

260 "If you find that the defendant has prevented the plaintiff from ascertaining the exact amount of the ore or its value, by extracting and removing the same, or has placed it beyond the power of the plaintiff to make such proof certain and specific, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by his conduct by making every reasonable intendment against him in favor of the party injured."

XLVII.

The Court erred in giving to the jury its instruction No. 16, which said instruction is as follows, to wit:

"In estimating the damages to the plaintiff, if you find from the evidence that the defendant has prevented the plaintiff from ascertaining the true value of the ore, either by extracting the greater part of the ore, or all of the valuable ore in any particular places of the mine, or by mixing the ore taken from plaintiff's ground with ore of less value, belonging to defendant, or with any other material taken from any other places in the mine, then the jury, in determining the value of the ore taken, are at liberty to consider the highest value of ore found in the vicinity of the ore extracted."

XLVIII.

The Court erred in requiring the defendant to submit its exceptions to the charge of the Court, in writing, before the going out of the jury, and in the presence of the jury, the same being contrary to Rule No. 58 which is as follows, to wit:

Exceptions to a charge to a jury, or to a refusal to give as
261 a part of such charge instructions requested in writing, may be taken by any party by stating to the Court after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same.

XLIX.

The Court erred in inserting into the defendant's bill of exceptions on the settlement thereof, the exceptions in writing "hastily made and filed" before the going out of the jury, the same not having been proposed as an amendment by the plaintiff to defendant's proposed bill of exceptions.

L.

The Court erred in refusing to allow the exceptions to the charge of the Court given to the jury, as in defendant's proposed bill of

exceptions and in confining the exceptions of the defendant to the exact language used by it in the written exceptions filed before the retirement of the jury.

Wherefore, the said Montana Mining Company, Limited, plaintiff in error, prays that the judgment of the Circuit Court of the United States, for the District of Montana, be reversed and that the said Circuit Court be directed to enter an order setting aside
262 the verdict and judgment herein and dismissing the said cause of action.

W. E. CULLEN,
WM. WALLACE, JR., AND
W. E. CULLEN, JR.,
Attorneys for Plaintiff in Error.

[Endorsed:] No. 291. Title of Court and Cause. Assignment of Errors. Filed and entered August 21, 1905. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 21st day of August, A. D. 1905, the defendant herein, filed its petition for a Writ of Error and Order Allowing Same, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Petition for Writ of Error.

The Montana Mining Company, Limited, the defendant in the above-entitled cause, feeling itself aggrieved by the verdict
263 of the jury and the judgment entered in the above-entitled action on the 7th day of July, A. D. 1905, comes now by W. E. Cullen, Wm. Wallace, Jr., and W. E. Cullen, Jr., its attorneys, and petitions the court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which it shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

WM. WALLACE, JR.,
W. E. CULLEN,
W. E. CULLEN, JR.,
Attorneys for Defendant.

Aug. 21, 1905.

264 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Order Allowing Writ of Error.

Upon the motion of Messrs. W. E. Cullen, Wm. Wallace, Jr., and W. E. Cullen, Jr., attorneys for the defendant, and upon the filing — a petition for writ of error and assignment of errors:

It is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of the bond on said writ of error be and hereby is fixed at $212,000, and that said bond, when so given and approved by the Court shall operate as a supersedeas.

WM. H. HUNT, *Judge.*

Aug. 21st, 1905.

[Endorsed:] No. 291. (Title of Court and Cause.) Petition of Defendant for Writ of Error and Order Allowing the Same. Filed and entered August 21, 1905. Geo. W. Sproule, Clerk.

265 And thereafter, to wit, on the 24th day of August, A. D. 1905, defendant filed its bond on writ of error herein, as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Plaintiff,
vs.
MONTANA MINING COMPANY, LIMITED, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, the Montana Mining Company, Limited, a corporation duly organized under the laws of Great Britain, and doing and entitled to do business in the State of Montana, as principal, and the Union Bank and Trust Company, a corporation organized under the laws of the State of Montana and qualified to be a surety on judicial bonds, are held and firmly bound unto the plaintiff, the St. Louis Mining and Milling Company of Montana, a corporation duly organized under the laws of the State of Montana in the full and just sum of two hundred and twelve thousand ($212,000) dollars to be paid to the said St. Louis Mining

and Milling Company of Montana, its certain attorneys or
266 assigns, to which payment well and truly to be made we bind ourselves, our successors and our assigns and each of them jointly and severally and firmly by these presents.

Sealed with our seals and dated this 22d day of August, A. D. 1905.

Whereas, lately at a Circuit Court of the United States for the Ninth Circuit, District of Montana, in a suit pending in said court between the said St. Louis Mining and Milling Company of Montana, plaintiff, and the said Montana Mining Company, Limited, as defendant, a judgment was rendered against the said Montana Mining Company, Limited, and the said Montana Mining Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said St. Louis Mining and Milling Company of Montana, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, in said Circuit, on the 23d day of September next.

Now, the condition of the above obligation is such that if the said Montana Mining Company, Limited, shall prosecute said writ of error to effect and answer all damages and costs, if it fail to make the said plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

And the above-named surety, the Union Bank and Trust Company, does hereby covenant and agree to and with the said
267 St. Louis Mining and Milling Company of Montana, that in case of a breach of any condition in the foregoing bond, this court may, upon notice to it of not less than ten days, proceed summarily in the action or suit in which the same is given, to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it and award execution thereon.

MONTANA MINING COMPANY, LIMITED,
By ALEX. BURRELL, *General Manager.*
UNION BANK AND TRUST COMPANY,
By GEO. L. RAMSEY, *President.*

Attest:
[SEAL.] C. F. MORRIS, *Secretary.*

Sealed and delivered in the presence of:
S. McKENNAN.
P. O. WELLS.

Approved by:

WILLIAM H. HUNT,
United States District Judge.

[Endorsed:] No. 291. (Title of Court and Cause.) Bond. Filed and entered August 24, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

268 *Writ of Error.*

THE UNITED STATES OF AMERICA, *Ninth Judicial Circuit, ss:*

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Ninth Circuit, District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Circuit Court before you, or some of you, between the St. Louis Mining and Milling Company of Montana, plaintiff, and the Montana Mining Company, Limited, defendant, a manifest error hath happened to the great damage of the said Montana Mining Company, Limited, defendant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, in said Circuit Court, on the 23d day of September next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error,
269 what of right and according to the laws and customs of the United States should be done.

WILLIAM H. HUNT,
United States District Judge.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 24th day of August, A. D. 1905, the one hundred and thirtieth year of the Independence of the United States of America.

Attest:
[SEAL.]

GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW,
Deputy Clerk.

Service of the above writ of error accepted this 24th day of August, A. D. 1905.

BACH & WIGHT,
M. S. GUNN, AND
J. B. CLAYBERG,
Attorneys for Plaintiff.

Return to Writ of Error.

The Answer of the Judges of the Circuit Court of the United States for the District of Montana.

The record and all proceedings of the plaintiff in error, wherein mention is within made, with all things touching the same, I hereby certify, under the seal of said court, to the United States Circuit Court of Appeals for the Ninth Circuit within men-
270 tioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court:

[SEAL.] GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW,
Deputy Clerk.

[Endorsed:] No. 291. In the Circuit Court of the United States, Ninth Circuit, District of Montana. St. Louis Mining and Milling Co. of Montana, Plaintiff, *vs.* Montana Mining Co., Limited, Defendant. Writ of Error. Filed and entered Aug. 24, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

Citation.

The United States Circuit Court of Appeals, for the Ninth Circuit.

THE UNITED STATES OF AMERICA, *Ninth Judicial Circuit, ss:*

To the St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, in said Circuit, on the 23d day of September next, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Ninth Circuit, District
271 of Montana, wherein the Montana Mining Company, Limited, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of August, A. D. 1905, the one hundred and twenty-ninth year of the Independence of the United States of America.

WILLIAM H. HUNT,
United States District Judge.

We hereby this 24th day of August, A. D. 1905, accept due personal service of this citation on behalf of the St. Louis Mining and Milling Company of Montana, the defendant in error.

BACH & WIGHT,
M. S. GUNN, AND
J. B. CLAYBERG,
Attorneys for Defendant in Error.

[Endorsed:] No. 291. In the Circuit Court of the United States for the Ninth Circuit, District of Montana. St. Louis Mining and Milling Company of Montana, Plaintiff, *vs.* Montana Mining Company, Limited, Defendant. Citation. Filed and entered Aug. 24, 1905. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy Clerk.

272 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, *District of Montana, ss:*

I, George W. Sproule, clerk of the United States Circuit Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, that the foregoing volume, consisting of two hundred and forty-one (241) pages, numbered consecutively from one to two hundred and forty-one (241), is a true and correct transcript of the pleadings, process, records, orders, judgment, and all proceedings had in said cause and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause with admission of service thereof.

I further certify that the cost of the transcript of record amounts to the sum of one hundred and eight and 65/100 dollars ($108.65), and has been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States Circuit Court at Helena, Montana, this 25th day of August, A. D. 1905.

[SEAL.] GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW,
Deputy Clerk.

273 [Endorsed:] No. 1240. United States Circuit Court of Appeals for the Ninth Circuit. The Montana Mining Company, Limited, Plaintiff in Error, *vs.* The St. Louis Mining and Milling Company of Montana, Defendant in Error. Transcript of Record. Error to the Circuit Court of the United States for the District of Montana. Filed September 1, 1905. F. D. Monckton, Clerk.

EXHIBIT "PATENT."

General Land Office, No. 12338.

Mineral Certificate, No. 1245.

THE UNITED STATES OF AMERICA:

To All to Whom These Presents Shall Come, Greeting:

Whereas, in pursuance of the provisions of the Revised Statutes of the United States, Chapter Six, Title Thirty-two, and legislation supplemental thereto, there have been deposited in the General Land Office of the United States the Plat and Field Notes of survey and the Certificate, No. 1245, of the Register of the Land Office at Helena, in the Territory of Montana, accompanied by other evidence, whereby it appears that Charles F. Mayger did, on the twenty-first day of August, A. D. 1885, duly enter and pay for that certain mining claim or premises, known as the St. Louis lode mining and mill-site claim, designated by the Surveyor General as Lots Nos. 54 and 55A and 55B, embracing a portion of townships eleven and twelve north of ranges six west of the
274 principal meridian, in the Mining District, in the County of Lewis and Clarke, and Territory of Montana, in the District of Lands subject to sale at Helena, and bounded, described and platted as follows, with magnetic variation as hereinafter stated.

Beginning for the description of the lot- Nos. 54 and 55A, at corner No. 1, a granite stone 16 x 12 x 12 inches, marked 1 M. C. 54, a mound of stones alongside, from which the quarter section corner on the south boundary of section thirty-six, in township twelve north of range six west of the Principal meridian, bears south seventy-four degrees and fifteen minutes east three hundred and fifty-three feet distant.

Thence, first course, magnetic variation nineteen degrees east, south twenty-one degrees and fifteen minutes west one hundred and two feet intersect line between townships eleven and twelve north of range six west, a granite stone 15 x 14 x 12 inches, marked 54, M. C. 55A; four hundred and fifty feet to a point, from which a shaft bears north sixty-seven degrees west two hundred and eighty-five feet distant, and from said shaft an open cut 3 by 5 feet, one hundred feet long, runs south fifty-four degrees east; six hundred and fifty-five feet to a point, from which a shaft bears west one hundred and fifty-three feet distant; one thousand and ninety-seven feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked 2 M. C. 55A, a mound of stones alongside, from which the center of discovery shaft bears north thirty-five degrees and thirty minutes, west two hundred and eighty-nine feet distant.

275 Thence, second course, magnetic variation nineteen degrees east, south fifty-one degrees and thirty minutes west four hundred and three feet to corner No. 3, a slate stone 14 x 10 x 4 inches, marked 3 M. C. 55A, a mound of stones alongside, from

which the southeast location corner bears south ten degrees east four hundred and thirty-five feet distant.

Thence, third course, magnetic variation nineteen degrees east, north forty-five degrees and thirty minutes west six hundred feet to corner No. 4, a granite stone 20 x 8 x 7 inches, marked 4 M. C. 55A, a mound of stones alongside, from which the southwest location corner bears south seventy-nine degrees west one hundred and eighty-two feet distant.

Thence, fourth course, magnetic variation nineteen degrees east, north fifty-one degrees and fifteen minutes east four hundred and twenty-five feet to corner No. 5, a granite stone 16 x 12 x 6 inches, marked 5 M. C. 55A, a mound of stones alongside.

Thence, fifth course, magnetic variation nineteen degrees east, north twenty-one degrees and forty-five minutes east five hundred and twenty-nine and seven-tenths feet intersect said township line, a granite stone 18 x 14 x 7 inches, marked 55A, 54 M. C., one thousand and sixty-nine feet to corner No. 6, a granite stone 18 x 12 x 6 inches, marked 6. M. C. 54, from which a fir tree thirteen inches in diameter marked 6 M. C. 54 B. T. bears north fifteen degrees east twenty-four feet distant, and a pine tree five inches in diameter marked 6 M. C. 54 B. T. bears south fifty-four degrees east twenty-one and five-tenths feet distant.

276 Thence, sixth course, magnetic variation nineteen degrees east, south forty-five degrees and thirty minutes east five hundred and fifteen and five tenths feet to corner No. 1 of lot No. 40, the Drumlummon lode claim; five hundred and seventy-nine feet to corner No. 1, the place of beginning; said lot Nos. 54 and 55A extending one thousand five hundred feet in length along said St. Louis vein or lode, the granted premises in said lot containing eighteen acres and ninety-three hundredths of an acre.

Beginning for the description of the lot No. 55B, at corner No. 1, a granite stone 18 x 12 x 6 inches, marked 1 M. C. 55B, a mound of stones alongside, from which corner No. 4 of lot No. 55A, hereinbefore described, bears south thirty-five degrees and nine minutes east four hundred and ninety-eight and seven tenths feet distant.

Thence, first course, magnetic variation nineteen degrees east, north twenty-seven degrees east two hundred and ninety-five feet to corner No. 2, a granite stone 14 x 12 x 12 inches, marked 2 M. C. 55B, a mound of stones alongside.

Thence, second course, magnetic variation nineteen degrees and thirty minutes east, north sixty-eight degrees and forty-five minutes west two hundred and thirty-one feet to corner No. 3, a granite stone 18 x 14 x 5 inches, marked 3 M. C. 55B, a mound of stones

277 alongside, from which the northwest location corner bears north thirty-degrees east sixteen feet distant.

Thence, third course, magnetic variation nineteen degrees and thirty minutes east, south thirty-one degrees and thirty minutes west two hundred and thirty feet to corner No. 4, a granite stone 18 x 12 x 8 inches, marked 4—55B and 3—37 M. C.—38, a mound of stones alongside, being also corner No. 26 of lot- Nos. 37 and 38,

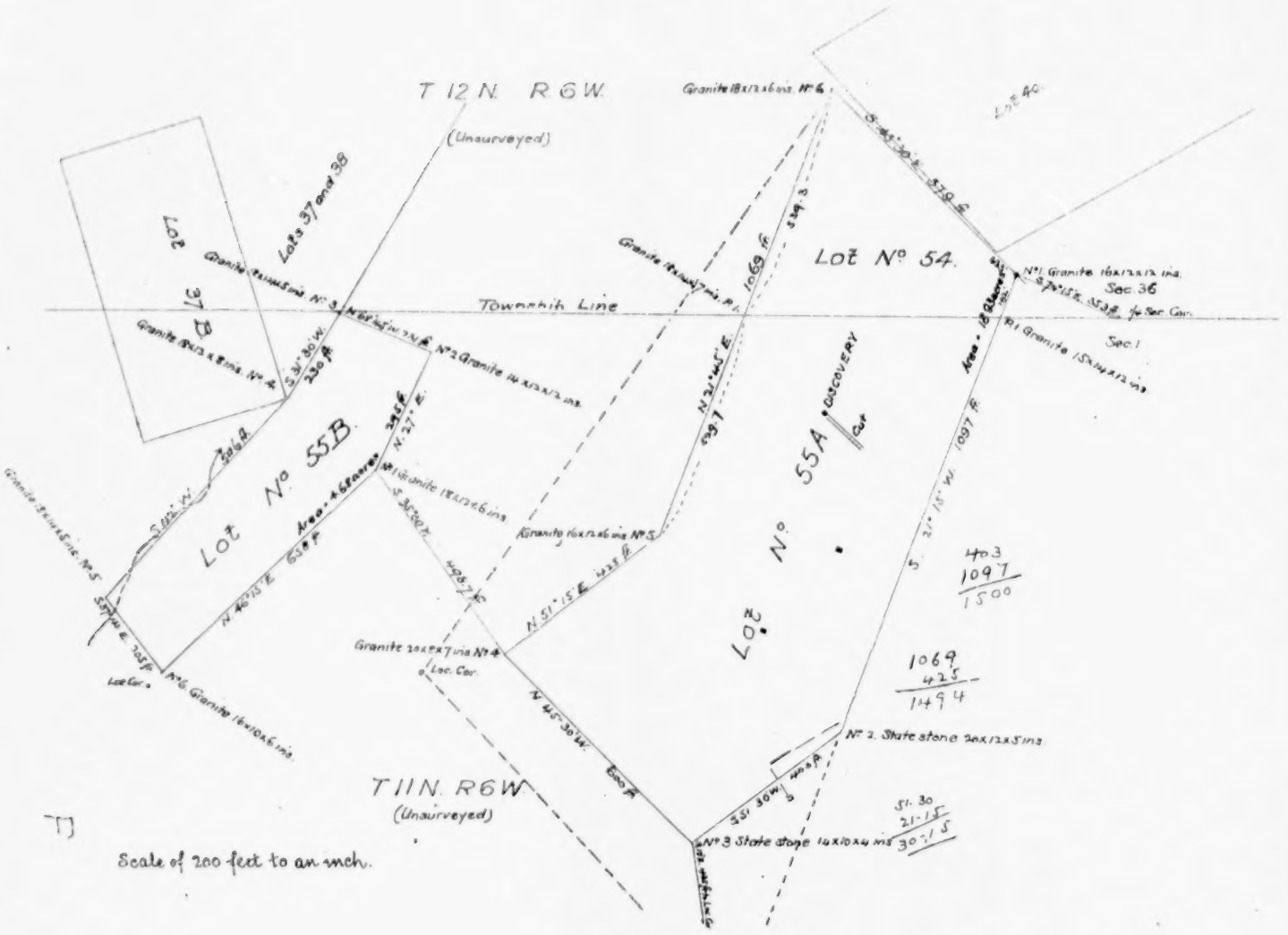
a placer claim, and corner No. 3 of lot No. 37B, a millsite claim, from which corner No. 1 of this claim, bears south fifty-three degrees and thirty minutes east two hundred and fifty-one feet distant.

Thence, fourth course, magnetic variation nineteen degrees and thirty minutes east, south forty-two degrees west two hundred and sixty feet to brook; three hundred and twenty feet said brook; five hundred and twenty feet said brook; five hundred and ninety-six feet to corner No. 5, a granite stone 18 x 14 x 5 inches, marked 5 M. C. 55B, a mound of stones alongside.

Thence, fifth course, magnetic variation nineteen degrees and thirty minutes east, south thirty-seven degrees and forty-five minutes east thirty-three feet brook; two hundred and five feet to corner No. 6, a granite stone 16 x 10 x 6 inches, marked 6 M. C. 55B, a mound of stones alongside, from which the southeast location corner bears south forty-three degrees and thirty minutes west forty-five feet distant.

278 Thence, sixth course, magnetic variation nineteen degrees and thirty minutes east, north forty-six degrees and fifteen minutes east six hundred and fifty-eight feet to corner No. 1, the place of beginning, containing four acres and sixty-eight hundredths of an acre, which together with the area embraced in the granted premises in said lot- Nos. 54 and 55A aggregates twenty-three acres and sixty-one hundredths of an acre of land, more or less, as represented by yellow shading on the following plat.

(Here follows diagram marked page 279.)


T 12 N. R 6 W.
(Unsurveyed)
Granite 18x12x6 ins. No 6
Lot 40
S. 45° 30' E. 379.6
Lot No 54.
No 1 Granite 16x12x12 ins.
Sec 36
S. 74° 15' E. 553.8 ft. to Sec. Cor.
No 1 Granite 15x14x12 ins.
Sec. 1
Township Line
Lots 37 and 38
Lot 37 B
Granite 24x12x8 ins. No 3
N. 68° 45' W. 234 ft.
No 2 Granite 16 x 12 x 12 ins.
S. 38° 30' W. 230 ft.
Granite 18x12x8 ins. No 4
Lot No 55 B.
Area - 4.6 Acres
N. 27° E. 395 ft.
No 1 Granite 18x12x6 ins.
S. 38° 30' E. 498.7 ft.
Granite 16x12x6 ins No 5
N. 24° 45' E. 693.1 ft.
Area - 4.6 Acres
Lot No 55 A
Discovery Cor
S. 21° 15' W. 697 ft.
N. 46° 15' E. 658 ft.
N. 51° 15' E. 435 ft.
Granite 20x12x7 ins No 4
Loc. Cor.
Lot No
403
1097
1500
1069
425
1494
No 2. Sate stone 20x12x5 ins
N. 45° 30' W. 600 ft.
S. 35° 30' W. 405 ft.
No 3 State stone 14x10x4 ins
51. 30
21. 15
30. 15
T 11 N. R 6 W.
(Unsurveyed)
Scale of 200 feet to an inch.

280 & 281 Now know ye, That there is therefore hereby granted by the United States unto the said Charles F. Mayger, and to his heirs and assigns, the said mining premises hereinbefore described, and not expressly excepted from these presents, all that portion of the said St. Louis vein, lode, or ledge, and of all other veins, lodes and ledges, throughout their entire depth, the tops or apexes of which are inside of the surface boundary lines of said granted premises in said Lot- Nos. 54 and 55A extended downward vertically, although such veins, lodes, or ledges in their downward course may so far depart from a perpendicular as to extend outside the vertical side lines of said premises: Provided, That the right of possession to such outside parts of said veins, lodes, or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said Lot- Nos. 54 and 55A, so continued in their own direction that such planes will intersect such exterior parts of said veins, lodes, or ledges: And provided further, That nothing herein contained shall authorize the grantee herein to enter upon the surface of a claim owned or possessed by another.

To have and to hold said mining premises, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said grantee above named and to his heirs and assigns forever; subject, nevertheless to the above-mentioned and to the following conditions and stipulations:

First. That the premises hereby granted, with the exception
282 of the surface, may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge.

Second. That the premises hereby granted shall be held subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights as may be recognized and acknowledged by the local laws, customs, and decisions of courts.

Third. That in the absence of necessary legislation by Congress, the Legislature of Montana may provide rules for working the mining claim or premises hereby granted, involving easements, drainage, and other necessary means to its complete development.

In testimony whereof, I, Grover Cleveland, President of the United States of America, have caused these letters to be made patent, and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the twenty-second day of July, in the year of our Lord one thousand eight
283 hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

By the President:

[SEAL.] GROVER CLEVELAND,
By M. McKEARR, *Secretary.*
ROBT W. ROSS,
Recorder of the General Land Office.

Recorded Vol. 151, Pages 358 to 364, inclusive.
Examined.
No. 286A. United States Patent, No. 3, for Charles F. Mayger.

STATE OF MONTANA, *County of Lewis and Clarke, ss:*

I hereby certify that the within instrument was filed in my office on the 5th day of Dec. A. D. 1889, at 55 min. past 4 o'clock, P. M., and recorded on page 302 of Book 1, of the U. S. Records of Lewis and Clarke County, Montana Territory.

J. S. TOOKER,
County Recorder,
By F. W. COOMBS, *Deputy.*

Fees, $7.50, pd.

284 Filed May 8th, 1893.

GEO. W. SPROULE, *Clerk.*

Filed Sept. 28, 1893.

GEO. W. SPROULE, *Clerk.*

Pl'ff's Ex. 11. Filed June 15, 1905.

GEO. W. SPROULE, *Clerk,*
By C. R. GARLOW, *Deputy.*

No. 1240. United States Circuit Court of Appeals for the Ninth Circuit. Exhibit "Patent." Received Sept. 1, 1905. F. D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

285 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Printed Transcript of Record.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing two hundred and eighty-four (284) pages, numbered from one (1) to two hundred and eighty-four (284), inclusive, including the index and cover thereto, to be a true copy of the printed transcript of record upon writ of error to the Circuit Court of the United States for the District of Montana, in the above-entitled case, as the original and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United

States Circuit Court of Appeals for the Ninth Circuit and as said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 17th day of September, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk*.

286 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

287 At a stated term, to wit: the October term A. D. 1905 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Tuesday the tenth day of October in the year of our Lord one thousand, nine hundred and five.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Order on Hearing.

Ordered, cause argued by Mr. W. E. Cullen, counsel for the plaintiff in error, and Mr. M. S. Gunn, counsel for the defendant in error, and continued to to-morrow for further argument.

288 At a stated term, to wit: the October term A. D. 1905 of the United States Circuit Court of Appeals for the Ninth Circuit, held at the Court Room, in the City and County of San Francisco, on Wednesday the eleventh day of October in the year of our Lord one thousand, nine hundred and five.

Present: The Honorable William B. Gilbert, Circuit Judge; Honorable Erskine M. Ross, Circuit Judge; Honorable William W. Morrow, Circuit Judge.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Order of Submission.

Ordered, cause further argued by Messrs. M. S. Gunn and Arthur Brown, counsel for the defendant in error, and Mr. Charles J. Hughes, Jr., counsel for the plaintiff in error, and submitted to the Court for consideration and decision.

289 In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Monday, August 13, 1906.

In Error to the Circuit Court of the District of Montana.

This was an action brought in the Circuit Court of the United States for the District of Montana by The St. Louis Mining and Milling Company, a Montana corporation, defendant in error, against The Montana Mining Company, Limited, a corporation organized under the laws of Great Britain, plaintiff in error, to recover damages for trespass upon a vein of mineral, the top or apex of which lies inside the surface lines of the St. Louis claim, but which vein in its downward course, departing from a perpendicular, crosses the vertical side lines of the St. Louis claim and enters beneath the surface of the adjoining claim owned by the Montana Company, where the trespass upon the vein by the Montana Company is charged
290 to have been committed and the appropriation by that company of large quantities of valuable ore extracted from the vein.

The first paragraph of the Second Amended and Supplemental Complaint alleged the corporate character of the plaintiff and defendant.

In the second paragraph of the Complaint, it was alleged that at the times mentioned therein the plaintiff was "the owner of, entitled to, and in the actual possession and occupation of that certain quartz

lode mining claim known as the St. Louis Quartz Lode Mining Claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis Lode Mining Claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis Quartz Mining Claim."

The Complaint contained a full description of this claim by monuments, courses and distances, concluding with this exception:

"Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known as designated as the Nine Hour lode mining claim."

In the third paragraph it was alleged: "That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode Mining Claim, situate and being east of the said St. Louis Lode Mining Claim, and including the 30 foot strip or compromise ground aforesaid, and that the discovery, location and recordation of the said St. Louis Lode Mining Claim and the United States patent
291 therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour Lode Mining Claim."

In the fourth paragraph it was alleged: "That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the said St. Louis Mining Claim is to the east and dips under and beneath the said Nine Hour Lode Mining Claim, including the said thirty-foot strip or the compromise ground, which is a part and portion of the said Nine Hour Quartz Lode Mining Claim, which said portion of said vein has its top or apex within the said St. Louis Mining Claim as follows, to wit: Commencing at a projected parallel end line of said St. Louis Quartz Lode Mining Claim, at a point on the east side line thereof, between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging wall of said vein, lode, or lodge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz Lode Mining Claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line, 5 feet west of the east side line of said St. Louis Quartz Lode Mining Claim; thence, from where said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512 7/10 feet to a point, being the intersection of the said east side line of said St. Louis Quartz Lode Mining Claim, between corners Nos. 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 50 degrees 50 minutes west 108 feet and along the west line of the said thirty-foot strip, to a projected parallel end line of said St. Louis Quartz Lode Mining

Claim, extended vertically downward, which passes through
292 the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty-foot strip.

"That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot-wall of the said vein passes out of the east side line of the said St. Louis Mining Claim."

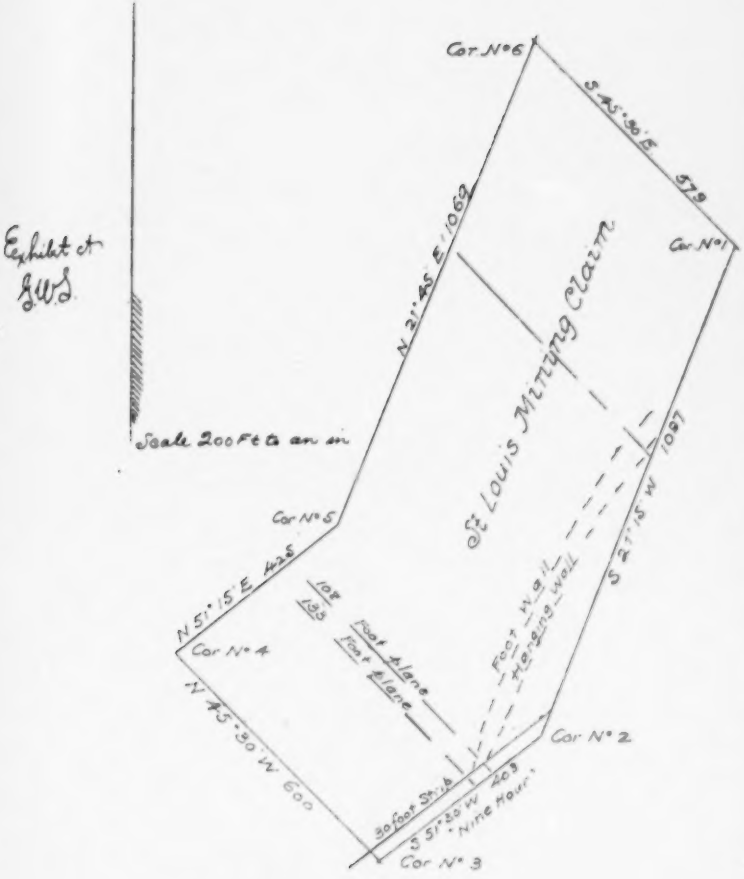
In the fifth paragraph it was alleged: "That notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the thirtieth day of June, 1893, knowingly, wrongfully, and unlawfully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis Mining Claim, and commenced extracting quartz, rock and ore therefrom, and removing the same, and converting it to his own use and benefit, and are now still removing and converting the same, which said quartz, rock and ore is of the value of two hundred thousand dollars; on account thereof this plaintiff has been damaged in said sum.

"That since the filing of the original complaint herein, and up to the twenty-sixth day of June, 1899, said defendant, Montana Mining Company, Limited, has extracted a large quantity of quartz, rock and ore from the premises and veins above described and within the planes aforesaid, and converted the same and the minerals therein contained to their own use, of the value of fifty thousand dollars, and to the damage of this plaintiff in said sum.

"Wherefore, plaintiff prays judgment for the said sum of two hundred and fifty thousand dollars, together with its costs and disbursements in this behalf expended."

293 A map or plat showing the point at which the said vein enters said St. Louis Lode Mining Claim as described in the complaint, and the point where the same departs therefrom upon the east line of said claim, is attached to the complaint, marked Exhibit "A" and made a part thereof. A copy of this map is annexed to this opinion for reference.

(Here follows map marked page 294.)



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} p. 294

295 The last clause of the Complaint relates to the damages alleged to have been sustained by the plaintiff after filing the original complaint and up to the 26th day of June, 1899, which were originally stated as being fifty thousand dollars, and the total damages as two hundred and fifty thousand dollars. This clause was amended by leave of the Court at the close of the last trial, on June 30, 1905, so as to change the $50,000.00 therein mentioned to $400,000.00, making the entire claim for damages $600,000.00.

The Montana Mining Company answered this Complaint June 30, 1899, admitting the allegations contained in paragraphs one, two, and three, and setting up the defense of an estoppel by deed, as follows:

"And this defendant, further answering, says that the plaintiff is estopped from claiming any of the mineral found or which may hereafter be found in said thirty-foot strip or compromise ground, for that heretofore, to wit, on or about the seventh day of March, A. D. 1884, one Charles Mayger, who was then and there the predecessor in interest of plaintiff, made, executed and delivered to William Robinson, James Huggins and Frank P. Sterling, who were and are the predecessors in interest of this defendant, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said thirty-foot strip or compromise ground to the predecessors in interest of this defendant, or their assigns, with all the mineral therein contained, a copy of which said bond is hereto attached, marked "Exhibit "A," and made a part of this answer. That thereafter and after the said Charles Mayger had obtained a United States patent for the whole of said St. Louis Lode Mining Claim, including said thirty-foot strip or compromise ground, the said Mayger, in order to cheat and defraud this defendant, assumed to convey
296 the said compromise ground to the above-named plaintiff. That thereafter this defendant demanded of and from the said defendant and from the said Mayger a deed for the said compromise ground in accordance with the terms and provisions of the bond aforesaid, and the said defendant and the said Mayger having refused and declining to make, execute or deliver such a deed, this defendant thereafter, and on or about the sixth day of September, A. D. 1894, commenced an action in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis & Clarke, wherein this defendant was plaintiff and the above-named plaintiff, together with the said Charles Mayger, were defendants, to compel the specific performance of the said bond for a deed hereinbefore mentioned and set forth; that thereafter such proceedings were had in said action as that on the first day of June, A. D. 1895, judgment was duly made and entered therein in favor of this defendant, the plaintiff therein, and against the plaintiff, defendant in said action, whereby, among other things, it was ordered, adjudged, and decreed that the said bond hereinbefore mentioned be specifically performed, and that the defendant, the above-named plaintiff, make, execute and deliver to this defendant a good and sufficient conveyance in fee simple absolute, free from all encumbrances for the premises mentioned and described in the complaint

in said action and in the bond hereinbefore mentioned; that in pursuance of said judgment, order and decree the said plaintiff, on or about the first day of July, A. D. 1895, made and executed a deed to this defendant of and for the said premises and of all the mineral therein contained; and thereafter the said deed was duly delivered to this defendant, a copy of which said deed is hereunto annexed, marked Exhibit "B" and made a part of this answer. And this defendant avers that in and by the said proceedings and the said
297 deed the said plaintiff is estopped from claiming any part of the said compromise ground or thirty-foot strip aforesaid, or any mineral contained therein.

"Wherefore, having fully answered, the defendant prays to be hence dismissed without day, and for its costs in this behalf expended."

To this answer the plaintiff filed a replication, in which it was denied that plaintiff was estopped for any of the causes or reasons set up in the said answer, or any other cause or reason, from claiming any of the mineral found or that might be at any time thereafter found in said thirty-foot strip or compromise ground. Plaintiff admitted the execution of the bond as stated in the answer and averred that the same was executed and made on account of an application of the said Mayger for a patent to the said St. Louis Lode Mining Claim, and on account of an adverse claim interposed by the said defendant's predecessor in interest of said thirty-foot strip or compromise ground as being a part of what was known as the Nine Hour Quartz Lode Mining Claim. Plaintiff admitted that the said Mayger agreed to convey said thirty-foot strip or compromise piece of ground, with all the minerals therein contained, to the predecessor in interest of the said defendant, and averred that the said claim of plaintiff comprised no minerals contained in or beneath said thirty-foot strip or compromise ground, except such as were contained in leads, lodes, or ledges which had their tops or apexes within the St. Louis Quartz Lode Mining Claim, exclusive of said thirty-foot strip or compromise ground. The plaintiff further averred that it was seeking to recover only such quartz, rock, or ore, and the value thereof, and the damages for the removal and conversion of the same, as comprised lodes, leads, or ledges having their tops or apexes within the boundary lines of the said
298 St. Louis Lode Mining Claim, exclusive of said thirty-foot strip or compromise ground.

Plaintiff admitted that Mayger obtained a patent for the said thirty-foot strip or compromise ground, but denied that any conveyance was made by him to plaintiff to defraud any one, and averred that all matters in relation thereto had been concluded by the judgment of the court and the deed mentioned in defendant's answer executed in pursuance thereof; that the thirty-foot strip or compromise ground was at all times a part and portion of the quartz lode mining claim known as the Nine Hour claim; that the same was never a part or portion of the St. Louis Quartz Lode mining claim; that in the action in the district court of the first Judicial district of the State of Montana in and for the county of Lewis

& Clarke, wherein the defendant was plaintiff and plaintiff and Charles Mayger were defendants, the action was based upon the agreement mentioned in said answer, and was brought for the purpose of compelling the defendants therein in accordance with said agreement, to execute and deliver to the plaintiff therein a good and sufficient deed for the premises known as the thirty-foot strip or compromise ground; that the court found and determined as a matter of fact that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour Lode mining claim, and was by the parties to said agreement agreed to be a part thereof, and that the said agreement was made and given for the purpose of settling and determining and fixing the boundary line between the said Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim, the boundary of which claims had been and was at the time of the execution of said agreement in conflict, and concerning which a controversy then existed between the parties to said agreement; that the deed mentioned in the Answer is the deed which the court adjudged in said action should be executed for the purpose
299 of performing the agreement above referred to; that said deed conveyed no other title than such as was attached and incident to the said thirty-foot strip or compromise ground, and that the minerals therein contained were intended to comprise and did comprise all such minerals as were contained in veins, lodes, or ledges having their tops or apexes inside of said thirty-foot strip.

The controversy between the plaintiff and the defendant, as stated in these pleadings, was whether the deed executed and delivered by the plaintiff on the first day of July, 1895, conveying the thirty-foot strip or compromise ground to the defendant, included the extralateral right of a vein apexing within the boundaries of the St. Louis claim but passing on its downward course beyond the vertical side line of such claim into the thirty-foot strip or compromise ground, and if this deed did not include such extralateral right, then the extent of such vein and the extralateral right in the thirty-foot strip or compromise ground, that it to say, where as in this case, the vein has a width of twenty-five feet and crosses the vertical side line at an angle; whether the extralateral right ceases at the point where a part of the apex of the vein represented by the hanging wall crosses the side line, or whether the right adheres to the vein until its entire apex represented by the foot-wall has crossed the side line of the claim into the adjoining ground.

The vein described in these pleadings as having its apex within the surface location of the St. Louis mining claim is shown on the map or plat attached to the complaint. The apex of the vein, as described in paragraph four of the complaint, commences on a projected parallel end line "at a point from which corner No. 1, being the northeast corner of the said St. Louis Quartz Lode Mining Claim, bears north 12 degrees 15 minutes east, distant 520
300 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line 5 feet west of the east side line of said St. Louis Lode Mining Claim," thence the

vein continues within the surface boundaries of the St. Louis mining claim in a general southerly direction to the line of the 108-foot plane, which designates the point where the hanging wall of the vein crosses the vertical side line of the St. Louis claim, and the line of the 133-foot plane designates the point where the foot-wall of the same vein crosses the same side line.

In the course of the trial in the circuit court this vein was designated by the witness as the Drum Lummon vein, and it has since been known in the proceedings by that name.

Upon the issues presented by the pleadings the case was tried by the Court and a jury, and on August 12, 1899, a verdict was rendered in favor of the plaintiff for $23,209. On August 16, 1899, a judgment was entered thereon. The Montana Company being dissatisfied with this judgment, sued out a writ of error October 7, 1899, and brought the case to this Court for review.

It was contended on behalf of the Montana Company, as grounds for reversal of the judgment, among other things, (1) that the complaint did not state a cause of action, and (2) that by the execution of the bond, the entry of the judgment enjoining specific performance of the conditions of the bond, and the execution of the deed of conveyance mentioned in the answer, the St. Louis Company was estopped from claiming any ore in the thirty-foot strip or compromise ground. This court held that the allegations of the complaint that the plaintiff was the owner and in possession of the St. Louis claim and of the ore and precious metals contained in any and all veins, lodes, ledges, and mineral-bearing rock
301 through their entire depth, the tops or apexes of which were within the surface lines of the St. Louis Claim; that the strip of land beneath the surface of which the ores in controversy were mined was located east of the east side line of said claim; that the dip of one of the veins having a portion of its apex inside the surface lines of the St. Louis claim was to the east and dipped under and beneath the thirty-foot strip of the Nine Hour claim, and that from this vein so apexing within the St. Louis claim and extending beneath the Nine Hour claim the ores in controversy had been mined by defendant, were sufficient, in the absence of a demurrer, to support a judgment in favor of the defendant for the conversion of such ores. This court also held that the conveyance by the St. Louis Company to the Montana Company of the land in controversy, in pursuance of a decree of court, had no other effect than to fix the surface boundary of the side line between the two claims in accordance with the original contention of the grantee, and did not deprive the grantor of any extralateral right under the ground so conveyed.

In accordance with this opinion the judgment of the Circuit Court was affirmed May 14, 1900 (102 Fed., 430).

At the trial in the circuit court the St. Louis Company was restricted by the court to the damages it sustained by reason of the trespass of the defendant upon that portion of the Drum Lummon vein under the thirty-foot strip or compromise ground and under the Nine Hour claim between lines projected downward along the

dip of the vein from the 520-foot plane and the 108-foot plane, as represented on the map or plat attached to the complaint. But plaintiff offered to prove in addition the amount of ore taken by defendant from that portion of the vein the apex of which was divided by the western boundary of the thirty-foot strip or compromise ground between points represented on the same map or plat as the 108-foot plane and the 133-foot plane, which part
302 of the vein on its downward course also dipped beneath the thirty-foot strip or compromise ground and under the Nine Hour claim. The court refused to admit this testimony, and the value of the ore taken from this point of the Drum Lummon vein was not included in the judgment for the plaintiff. The plaintiff, being dissatisfied with the judgment because of the ruling of the court with respect to this testimony and the omission from the judgment of the value of the ore taken from this part of the vein, sued out a cross-writ of error January 30, 1900, and the case was brought here for review upon that question. The court in deciding this feature of the case, stated the question to be:

"When a secondary or accidental vein crosses the common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong?"

After discussing the question, the court said:

"Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing within the senior location until it has wholly passed beyond its side line. It follows that the court below erred in its refusal to admit the evidence offered as to the value of the ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes, and the cause is therefore remanded for a new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated."

303 In accordance with this opinion, the judgment of the Circuit Court was reversed October 8, 1900, 104 Fed. 664.

To review these two separate judgments of this Court the Montana Company sued out two writs of error from the Supreme Court of the United States. In that Court both writs of error were dismissed, on the ground that the judgment of this Court reversing the judgment of the Circuit court in the second case, operated to reverse the prior judgment of affirmance in the first case, and there being no final judgment in the case, the jurisdiction of the Supreme Court did not obtain (186 U. S. 24).

Upon the coming down of the mandate from the Supreme Court, this Court, October 8, 1902, entered a judgment that the judgments theretofore entered be vacated and set aside and in lieu thereof it was ordered and adjudged that the judgment of the Circuit Court be reversed with costs, and the cause remanded to the said Circuit Court

for a new trial, and a mandate was issued accordingly. Upon the new trial before the Court and a jury, the Court followed the law as declared by this Court in the two opinions rendered in the case, and a verdict was returned in favor of the plaintiff for $195,000, upon which a judgment was entered by the Court. To reverse this judgment the case is here upon writ of error.

Charles J. Hughes, Jr., William Wallace, Jr., W. E. Cullen, and W. E. Cullen, Jr., for Plaintiff in Error.

Bach & Wight, John B. Clayberg, Arthur Brown and M. S. Gunn, for Defendants in Error.

304 Before Gilbert, Ross, and Morrow, Circuit Judges.

MORROW, *Circuit Judge:*

It is contended by the plaintiff in error that the judgment of this court entered October 8, 1902, set the entire case at large, and upon the second trial relieved it from the rule prevailing in the United States Courts, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit.

In appellate proceedings the rule was stated by the Supreme Court in Browler *v.* McArthur, 7 Wheat., 58, as follows:

"It was too late to grant a rehearing in a cause, after it had been remitted to the court below, to carry into effect the decree of this court, according to its mandate; and that a subsequent appeal from the Circuit Court, for supposed error in carrying into effect such mandate, brought up only the proceedings subsequent to the mandate, and did not authorize an inquiry into the merits of the original decree."

In Sibbald *v.* United States, 12 Pet., 488, 492, a motion was made to reform a mandate issued by the court at a previous term so as to conform the same to the opinion given by the court at that time. In granting the motion the court stated its opinion of the course prescribed by law for it to take after final action upon a case brought within its appellate jurisdiction. The Court said:

"Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other pur-
305 pose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermediate with it, further than to settle so much as has been remanded."

In Supervisors *v.* Kennicott, 94 U. S. 498, the Supreme Court on a former appeal from the Circuit Court for the Southern District of Illinois, had decided that the mortgage in controversy in the case was valid in favor of *bona fide* holders of the bonds it was given to secure, and that the complainants were entitled to a decree for the amount of the bonds held by them. The direction of the Supreme Court, as stated in the opinion in that case, was that the judgment of the Cir-

cuit Court must be reversed and a new trial had. In accordance with this direction the Circuit Court upon the new trial appears to have opened up the case for a further hearing upon issues presented and decided upon the first appeal. On the second appeal the Supreme Court refused to consider these questions, referring to the fact that technically there could be no "new trial" in a suit in equity, and holding that the mandate of the Court was to be interpreted according to the subject-matter of the proceedings before the Supreme Court, and if possible so as not to cause injustice; that it was proper to inquire what must have been intended by the use of the term "new trial" in the decree, since it could not have its ordinary meaning, and for the purpose resort might be had to the opinion delivered at the time of the decree, citing the case of West *v.* Brasher, 14 Pet. 51. In refusing on the second appeal to consider questions decided on the first appeal, the court said:

"These questions are, therefore, no longer open; for it is settled in this court, that whatever has been decided here upon one appeal cannot be re-examined in a subsequent appeal of the same suit. Such subsequent appeal brings up for consideration only the
306 proceedings of the Circuit Court, after the mandate of this court."

In Roberts *v.* Cooper, 20 How., 481, the case was at law and was in the Supreme Court on a writ of error. On a previous writ of error the case had been remanded for a new trial (Cooper *v.* Roberts, 18 How, 173), and it was contended there, as it is here, that on a review of the case the party is to be heard at large both as to the law and fact. With respect to this contention the court said:

"On the last trial, the Circuit Court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our own decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members."

In Republican Min. Co. *v.* Tyler Min. Co., 79 Fed., 733, this Court had before it the question whether the owner of a mining
307 claim was deprived of the extralateral right pertaining to a vein apexing within the boundaries of his claim because the vein, although entering the claim through an end line and running its course lengthwise nearly parallel with the side lines for the greater

part of the length of the claim, passes out of the claim across a side line before it reaches the other end line. This question had been decided by the court upon a previous writ of error, in favor of the extra-lateral right claimed by the owner of the vein, and accordingly the court held that where a case has been brought before an appellate court and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; that the appellate court is not bound to consider any of the questions which were before the court on the first writ of error. In the case of the Mutual Reserve Fund Life Ass'n *v.* Beatty, 93 Fed., 747, this Court again referred to this rule in the following language:

"It is clear that the decision of the circuit court of appeals upon the former writ of error is the law of the case, and, so far as the court has considered the questions at issue, they must be deemed to be *res judicata*, and not open for review at this time."

In Thompson *v.* Maxwell Land Grant Co., 168 U. S., 451, 456, the Supreme Court stated the rule with respect to prior decisions and the authority of the opinions of the court in determining what has been decided, as follows:

"It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be re-examined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case. * * *

We take judicial notice of our own opinions, and although
308 the judgment and the mandate express the decision of the court, yet we may properly examine the opinion in order to determine what matters were considered, upon what grounds the judgment was entered and what has become settled for further disposition of the case."

In the present case this Court, on May 14, 1900, entered a judgment of affirmance in accordance with the opinion of the court in the case entitled in this Court Montana Min. Co. *v.* St. Louis Min. & Mill. Co. (102 Fed. 430); and on October 8, 1900, it entered a judgment of reversal in accordance with the opinion of the Court in the case entitled in this Court St. Louis Min. & Mill. Co. *v.* Montana Min. Co. (104 Fed., 664), both cases being writs of error from the same judgment in the court below.

The Supreme Court of the United States was of the opinion that the judgment in the last case operated to reverse the prior judgment of affirmance in the first case (186 U. S. 24). In accordance with this opinion, this Court entered a single judgment of reversal on October 8, 1902, and directed that a new trial be had. The mandate directed:

"That such new trial and further proceedings be had in said cause in accordance with the judgment of this court * * * and according to right and justice and the law of the United States ought to be had."

There is certainly nothing in this judgment to indicate a purpose on the part of the court to set aside its decisions rendered in the case. On the contrary, the fact that these decisions were not withdrawn or recalled and the case set at large, indicates that the court has no

intention of doing so. The decisions were allowed to stand as the opinions of this Court upon the issues presented by the writs of error and hence became the law of the case. The fact that the mandate does not contain a reference to these opinions does not de-
309 termine that they are without authority.

In the case of Empire State-Idaho Min. & Dev. Co. *v.* Hanley, 136 Fed., 99, this Court answered a similar objection in the following language:

"The fact that the views of the court so expressed in the opinion are not contained in the mandate which issued to the lower court renders them no less conclusive as the law of the case" citing Thompson *v.* Maxwell Land Grant Co., 168 U. S. 451.

We think that all questions considered and determined in our former decisions upon prior writs of error have become the law of the case; that the lower court was right in refusing to disregard such decisions, and that this court is without authority, upon this last writ of error, to reconsider the questions so determined.

We, therefore, pass over the assignments of error relating to questions which appear to have been determined in our previous decisions and come to the new questions raised upon the last trial.

After the taking of testimony had been concluded the plaintiff moved the court for leave to amend the *ad damnum* clause of the complaint, so as to change the allegation claiming $50,000 damages to an allegation claiming $400,000 damages. To this amendment the defendant objected, and the Court overruled the objection. The ruling is assigned as error.

Amendment to pleadings are within the discretion of the Court, and error will not lie to the granting or refusal thereof. Section 954 Revised Statutes; Chapman *v.* Barney, 129 U. S., 677.

The remaining assignments of error relate to the charge of the Court to the jury. It appears from the Transcript of Record that during the argument of respective counsel the Court directed the attention of counsel on both sides to Rule 58 of the court and
310 the decision of this Court in Montana Copper Company *v.* Van Buren, 133 Fed., 1, and Harvey *v.* Tyler, 2 Wall., 328, concerning instructions to juries. These decisions require that exceptions to instructions, to be available on writ of error, must be taken to each instruction specifically, and not to the instructions as a whole, and that the record must show that they were taken and the points of exception designated while the jury were at the bar; that it is improper practice to permit formal exceptions to be then noted and the specifications of objections to be supplied in the record later, the object of the rule being that the attention of the trial court shall be called to the precise point to which exception is taken while it may be remedied by the Court and before the case is finally submitted to the jury.

Rule 58 of the circuit court for the district of Montana appears to be the same as Rule 58 of the circuit court for the northern district of California, which permits exceptions to the charge or a refusal to give as a part of such charge instructions requested in writing to be taken by any party by stating to the court, after the jury have

retired to consider their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs, or in any other convenient manner, the parts of the charge excepted to and the requested instruction the refusal to which is excepted to.

The record of the proceedings of the court with respect to instructions to the jury is as follows:

"After delivering the charge, the court, before the going out of the jury for the considering of their verdict, requested counsel to submit any exceptions they might have to the charge, and to the instructions requested and given or refused.

311 "Thereupon, before the jury retired, counsel for both parties retired to the judge's room with the charge of the court, which was in writing, in their possession, and prepared in writing such objections and exceptions to the charge and the several parts thereof, and to the refusals to charge, as they desired, and thereafter in court the defendant presented the following exceptions and none other, which were then and there received by the court, and signed and allowed before the jury retired."

The exceptions were as follows:

"The defendant, immediately after the court had charged the jury and before they had left their seats or retired to consider of their verdict, submitted in writing to the court its objections and exceptions to the said charge, and portions thereof, which objections were then and there severally overruled, and defendant then and there duly excepted. The defendant also submitted in writing herein its objections and exceptions to the charges offered by the defendant and refused, which objections were likewise severally overruled and defendant then and there duly excepted.

"Said objections and exceptions are respectively as follows, to wit:"

Then follow forty exceptions to the refusal of the court to give instructions as requested, and sixteen exceptions to instructions given by the court. This bill of exceptions concludes as follows:

"Notice of the foregoing exceptions are given by the defendant and are received and considered by the court before the going out of the jury on this 6th day of July, 1905.

(Signed) "WILLIAM H. HUNT, *Judge.*"

312 The verdict of the jury was returned July 7, 1905. The record contained a second bill of exceptions relating to instructions to the jury, proposed after the trial had closed, as follows:

"In defendant's proposed bill of exceptions, upon July 31, 1905, the defendant stated its exceptions to the charge given by the court, in the following language:"

Then follow ten objections to specific instructions of the court and a statement with respect to each objection that the court overruled the objection and gave the instruction. This part of the bill of exceptions concludes as follows:

"The Court declined to allow the exceptions as stated in the proposed bill of defendant, and directed that the bill incorporate the

exceptions and objections made and allowed before the jury retired, to which ruling of the court, the defendant then and there duly excepted."

Then follow eleven instructions which the defendant requested the court to charge the jury and which the Court refused, and the defendant excepted.

This second bill of exceptions was signed by the Judge and made a part of the record August 14, 1905.

The plaintiff in error contends that this second bill of exceptions, proposed after the close of the trial, may be taken and considered as a part of the bill of exceptions in the case, under Rule 58 of the Circuit Court. In United States *v.* Carey, 110 U. S., 51, the Supreme Court said:

"The rule is well established and of long standing that an exception to be of any avail must be taken at the trial. It may be reduced to form and signed afterwards, but the fact that it was seasonably taken must appear affirmatively in the record by a bill of ex-
313 ceptions duly allowed or otherwise."

In Beaver *v.* Taylor, 93 U. S., 46, 55, the Court said:

"One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so."

In Thiede *v.* Utah Territory, 159 U. S., 510, 522, the verdict in the lower court was returned on October 21. On November 2 counsel for defendant came into court and sought to save other exceptions to the charge. The court noted those exceptions, but declined to make any ruling on them. The Supreme Court said: "Obviously, they were too late."

It has been found that the proceedings connected with the taking of exceptions to the charge of the court in the hearing of the jury has sometimes caused the jury to form a wrong impression of the charge and its purpose. It has also frequently happened that after the jury has retired to deliberate upon their verdict they have returned into court and requested further instructions, and the court, in the absence of counsel, has given such instructions. Merchants' Exchange Bank *v.* McGraw, 76 Fed., 930, 936. Rule 58 of the Circuit Court was intended to provide for those two situations and cannot be construed as establishing a method of procedure in conflict with the long line of decisions of the Supreme Court of the United States, from Walton *v.* United States, 9 Wheat. 651 to Thiede *v.* Utah, *supra;* besides, the language of the rule does not justify such a construction. It was manifestly intended to permit exceptions to be taken to the instructions or the refusal to
314 give instructions after the jury had retired to consider their verdict where such a course would be in the interest of justice, and where instructions were given by the court in the absence of counsel, to permit exceptions to be taken as soon as practicable thereafter.

In the present case, after the judge had instructed the jury, in-

stead of sending the jury out, the judge retired to his chambers and there heard the exceptions to the charge out of the hearing of the jury. This action was in accordance with the spirit and purpose of the rule. It gave the parties ample opportunity to take exceptions without confusing the jury with the proceedings connected with the action of the Court in ruling upon a multitude of exceptions; but it was not intended by this permission, and the further provision that exceptions should be taken to the charge if practicable before the verdict had been returned, to give counsel the general permission to take exceptions to the charge after the close of the trial. Such permission would be contrary to the rule of procedure declared by the Supreme Court and by this Court in numerous cases. But, conceding that this rule was subject to the construction contended for by plaintiff in error, it was subject to another well established rule, that it is always in the power of a court to suspend its own rules or to except a particular case from their operation whenever the purpose of justice requires it. United States *v.* Breitling, 20 How., 252. This was manifestly such a case, and the action of the Court is to be commended rather than made a subject of criticism.

This second bill of exceptions cannot, therefore, be considered. It was not submitted in accordance with the instructions nor in accordance with the rule of the court.

315 In the first bill of exceptions many of the objections to the instructions of the court were noted in general terms, as, for example, that the instruction "does not correctly state the law," or is "contrary to law," or is "not sufficiently guarded," or is "misleading," or "inapplicable." These objections were not sufficiently specific and direct to call the attention of the court to the specific point claimed to be erroneous. They did not furnish the court with the information necessary to enable it to correct inaccurate, inadvertent or misleading expressions, if any such there were. (Merchants Exchange Bank *v.* McGraw, 76 Fed. 930, 936). Objections are also now urged to instructions which were not noted or presented to the court below in any form. None of these objections can now be considered.

In Paragraph 5 of the Instructions, the Court instructed the jury as follows:

"The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, betwen the 520 and 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

To this instruction the plaintiff in error interposed the objection (1) that the burden of proof never shifts as to extralateral rights for a discovery vein, and (2) that whoever has the burden is only

required to establish the fact by a fair preponderance of the
316 evidence, and (3) that this charge does not correctly state the law. The Court afterward instructed the jury, in Paragraph 7 as follows:

"It is conceded on this trial that the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis Quartz Lode Mining Claim, between the 520-foot plane and the 133-foot plane, which have been described to you in the evidence; but the defendant insists that the St. Louis Quartz Lode Mining Claim is not entitled to extralateral rights on the Drumlummon vein from which the ore was taken, and therefore, that plaintiff is not the owner of the ore extracted by defendant. The vein from which said ore was extracted is admitted to be a secondary or incidental vein of the St. Louis Claim."

There was no exception taken to this latter instruction. It was strictly in accordance with the pleadings, and the facts stated were admitted facts in the case, and, further than this, the previous decisions of this Court had determined that the St. Louis Company owned the mineral in this vein within the planes described, and such determination had become the law of the case.

The fifth paragraph of the instructions of the Court, to which objection is urged, could not, therefore, prejudice any right of the plaintiff in error. If the instruction is open to any criticism it would seem to be that the extralateral rights of the discovery vein were not in issue in the case. The only question in controversy under the pleadings was whether the St. Louis Company had conveyed the extralateral rights of the Drumlummon vein to the Montana Company by the deed of July 1, 1895, and if it had not, the damages
sustained by the St. Louis Company by reason of the trespass
317 of the Montana Company upon that vein. The first of these questions had been determined by this Court in favor of the St. Louis Company, and the second question was being determined in the trial then in progress. Whether the plaintiff had made a *prima facie* case of extralateral rights to either the discovery or Drumlummon veins was, therefore, immaterial. It had been determined upon the admitted facts in the case that the Drumlummon vein had such extralateral rights, and that was all that was necessary to be established to entitle the plaintiff to recover. The instruction that "The defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights" was also immaterial and did the plaintiff no injury, even if open to the objections urged against the instruction.

In Paragraph 8, the Court instructed the jury as follows:

"If you find that the course or strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or elsewhere, is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location.

"And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not neces-

sary, in order to give plaintiff extralateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis claim, between the 520 and 133-foot planes, that the discovery vein of the St. Louis Claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis claim between such planes generally lengthwise of the claim."

318 To this instruction the defendant excepted, on the ground that it was contrary to the law, in that no presumption whatever arises with reference to the course of the discovery vein.

The answer to the objection urged against Paragraph 5 of the Instructions, is a sufficient answer to this objection. If, however, the course, length, and dip of the discovery vein in the St. Louis claim were facts material to the question of the extralateral rights of the Drumlummon vein between the 520 and the 133-foot planes, then the Court covered the entire subject in Paragraph 9 of the Instructions, as follows:

"And if you find that the discovery vein (or veins so connected with it as to be part of the system of veins at the discovery point) runs lengthwise of the St. Louis claim between its side lines, and extends from the 520 to the 133-foot plane, and dips easterly, then plaintiff would be entitled to extralateral rights for that vein (or those veins) and to the like extralateral rights for all other veins having their apices within the same limits, and running in the same general direction."

To this instruction no exception was taken.

In Paragraph 25 the Court instructed the jury as follows:

"When you are told in this charge that the burden of proof upon any issue is upon either party to this action, you are to understand that such party must present evidence for your consideration which preponderates over the evidence of the other party upon that issue; and if, after due consideration of all the evidence introduced by the party having the burden of proof, it does not preponderate in

319 his favor, but that the evidence of each party upon the issue is equal, in your judgment, it is your duty to find such issue against the party having the burden of proof, under these instructions."

To this instruction no exception was taken.

All these instructions must be taken together. They qualify each other, and considered in that light, we do not think plaintiff was prejudiced by the instructions as to the burden of proof as given in Paragraphs 5 and 8 under any view of the case, either as to the law or the facts on which the case was submitted to the jury.

The use of the word "satisfaction," in Paragraphs 5 and 8 of the Instructions, is specifically objected to on the ground that it required the plaintiff in error to furnish a higher degree of proof than the law demands. What has been said about the burden of proof is applicable to this objection. Assuming that the word is objectionable, it did not injure the plaintiff in error as it related to a question not in issue on that trial.

The plaintiff in error contends that the instructions concerning the measure of damages were erroneous. The instructions objected to are contained in Paragraphs 11, 17, 18, 19, and 32 of the Instructions of the Court. To Paragraph 11 no exception was taken at the trial. In Paragraph 17 of the Instructions the Court instructed the jury as follows:

"If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use, quartz, rock and ore within the planes described in the complaint, from said vein, lead or lode, belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of said trespass, cannot be regarded as done without
320 notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injuries it has sustained."

To this instruction the defendant excepted, "for that it is contrary to law, is not sufficiently guarded and is misleading to the jury." Plaintiff in error contends that in this instruction the court instructed the jury that as to all ore dug after the commencement of the suit it was charged with knowledge and notice of the plaintiff's title, and therefore could not be an innocent or other than a wilful trespasser. The instruction does not appear to be open to such an interpretation. It was plainly intended to direct the attention of the jury to a question of evidence, and to instruct the jury that after the defendant had received notice and knowledge of plaintiff's claim of title to the ore in the vein in controversy the defendant should not be permitted to benefit by its trespass by placing or leaving evidence of the extent of such trespass uncertain. In other words, after notice, it was the duty of the defendant to keep a correct record of the quantity and value of the ore extracted, and, failing to do so, it was not to be benefited by this failure; the jury was to award just compensation for the damages sustained by the plaintiff by reason of the trespass. If this is not the correct interpretation of the instruction, it was the duty of the plaintiff in error in taking its execution at the trial to point out the precise point of the objection, that the Court might have made the instruction clear and direct with respect to the matter involved.
321 Failing to do this, the instruction is not now open to the objection urged against it.

Paragraph 18 of the instructions was as follows:

"The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the money expended in the running of levels, sinking shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the

ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant or any salaries paid to its officers, or any wages to any persons except those actually employed and engaged in extraction, transportation and milling of the ores in question."

To this instruction defendant excepted, "for that it is contrary to law and does not correctly define what mining and milling expenses may be deducted." Plaintiff in error now contends that instruction No. 11 (to which no exception was taken) and instruction No. 18 practically told the jury that a wilful trespasser could have no credit either for extraction or for cost of treatment or handling and that the court declined to advance the correct rule by refusing its requested instruction No. 43. This last instruction is not in the record and we are not advised as to its terms; and instruction No. 18 is not subject to the objection now urged against it.

Paragraph 19 of the instructions was as follows:

322 "When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it was a trespass upon said claim within its surface boundaries. And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis claim and the ore extracted therefrom."

To this instruction defendant excepted, "for the reason that it does not correctly define the possession plaintiff must have in order to support an action for trespass, and is not applicable to the facts proven and conceded in this case."

In Montana Min. Company *v.* St. Louis Min. & Mill. Company, 102 Fed. 430, 435 (one of the former decisions of this court in this case) this Court held that the possession of the surface of a mining claim is the possession of a vein or lode having its apex within the surface lines of the claim, although extending downward such vein may pass beyond the vertical side lines of the claim, and will support an action of trespass for the removal of ore from such vein beneath the surface of an adjoining claim.

Plaintiff in error contends that the Court was in error in

323 instructing the jury that the good faith and honest intent of the defendant in trespassing upon the vein in controversy and in extracting ore therefrom must be sufficient to excuse a similar trespass committed upon and within the surface boundaries of the

St. Louis claim; that the instruction denies to the plaintiff the benefit of the inference resulting from the work being done within its own surface, and directing the jury in effect to disregard all the peculiar facts bearing on the title to the compromise strip and the present litigation with reference thereto in evidence in that case when considering the issue of honest belief of ownership. The instruction did not direct the jury to disregard any fact tending to show good faith and honest intent. It simply stated that the evidence of good faith and honest intent must be the same in both cases, and this was clearly correct. There cannot be one measure of good faith and honest intent in one case and a different one in the other. The facts may be different, but good faith and honest intent remain the same. In paragraph 12 of the instructions the court made it clear that all facts and circumstances were to be considered by the jury in determining the question of good faith. The instruction of the court in that paragraph was as follows:

"In determining the question of the good faith of defendant in extracting and removing the ore in question, you are entitled to consider all the facts and circumstances shown by the evidence; if you find that the defendant acted under an honest belief that it was the owner of the ore in the disputed ground, and had good right and lawful authority to extract the same, and that such belief was based upon such facts and circumstances as that you believe that an ordinary man, acting as you find the defendant acted, would have had the honest belief that he owned such ore and
324 had a right to remove it, then the trespass was not willful."

In paragraph 32 of the instructions the court instructed the jury as follows:

"In considering any ore extracted from Block 8, part of which was removed under the authority of this court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed, you should make a deduction in accordance with the general rule laid down in the charge."

To this instruction the defendant excepted, for the reason that the same is contrary to law and would require the defendant to surrender its contention that such ore justly belongs to it."

It is urged, however, that the court charged the jury in effect that they should give no credit for ores held by the defendant under injunction process secured by the plaintiff itself, because it told them that defendant must have offered or left the ores in the possession of the plaintiff and proved their value, and this in face of the fact that the injunction order directed the defendant not to give them to any one, and the further fact that such surrender would have been an abandonment of defendant's claim of title, which formed

the basis of its defense in the injunction suit. It appears that
325 this question was before this Court in the case reported in 102 Fed. 436. Discussing this matter, the Court said:

"Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from 'disposing of, treating, and reducing any ores heretofore removed or extracted from said premises,' for the reason that such ores were held subject to the order of the court, and had not been converted to the use of the defendant. There is nothing in the pleadings or in the bill of exceptions to show that such ore had been returned or tendered to the defendant in error, or in any way accounted for; nor was evidence offered for the purpose of definitely fixing the value of such ore, so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if it desired to have the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to, or left in the possession of, the defendant in error, and to have submitted evidence of their value."

We think this is a sufficient answer to this objection.

We have carefully examined the Instructions as a whole and we find them clear, direct, and in conformity with the law. Where, upon the evidence before the Court, they have referred to questions admitted by the pleadings or previously determined by this Court, they have in no way prejudiced the rights of the plaintiff in error.

Finding no error in the record, the judgment of the Court below is affirmed.

(Endorsed:) Opinion. Filed Aug. 13, 1906. F. D. Monckton, clerk.

326 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In Error to the Circuit Court of the United States for the District of Montana.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the District of Montana and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

(Endorsed:) Judgment. Filed and Entered August 13, 1906. F. D. Monckton, Clerk.

327 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Judicial Circuit:

Comes now the Plaintiff in Error above named, The Montana Mining Company, Limited, and complains that in the records and proceedings had in the said cause, and in the opinion and judgment rendered therein on the 13th day of August, A. D. 1906, manifest error hath happened to the great damage of your Petitioner in this, to-wit:—

(*a.*) That in and by the opinion and judgment aforesaid, it was held that the second amended and supplemental complaint in said cause, being the complaint upon which said action was tried, did state facts sufficient to constitute a cause of action, and did not state facts showing that the plaintiff therein, the defendant in error here, had no cause of action.

(*b.*) Error was likewise committed by said Court in its opinion and judgment aforesaid in holding that the Circuit Court of the United States for the Ninth Circuit, District of Montana, did not commit error in permitting testimony to be given on the trial of said cause as to the existence of a discovery vein in the St. Louis lode mining claim, and as to the strike and dip of said vein, no allega-
328 tions whatever with reference to such vein or its dip or strike being made in the complaint, or being in the issues on the trial of said action.

(*c.*) The Court likewise erred in holding that a vein which enters and departs through the same side line of a mining claim has or can have extralateral rights under the Mineral Land Act of the United States.

(*d.*) Error was likewise committed by this Honorable Court in its opinion and judgment aforesaid, in holding that the above named defendant in error, The St. Louis Mining and Milling Company of Montana, was not estopped by its bond for a deed, the judgment rendered by the District Court of the State of Montana, within and for the county wherein the said St. Louis Lode is located in the specific performance case, and by its deed made under and by virtue of a decree in that case, from claiming any mineral whatever contained in

the thirty foot strip or compromise ground, or from claiming any other right, interest or right to the possession of said ground, or any part or portion thereof.

(*e.*) The Court erred in holding that the Circuit Court for the District of Montana, did not err in permitting the witness William Mayger to testify as to the ground which had been stoped out by the plaintiff in error northerly of the 130 plain, and to point the same out to the jury on the map (Plaintiff's Exhibit No. 1).

(*f.*) This Honorable Court also erred in holding that the Circuit Court for the District of Montana did not err in the trial of this case in refusing to permit the witnesses, John Langan, William Robinson, Warren Decamp, F. P. Sterling, John W. Eddy and Joseph K. Toole, to be called to the witness stand, and in requiring the plaintiff in error to submit to the Court in an offer of proof what it expected to establish by the testimony of each of said witnesses severally.

329 (*g.*) This Honorable Court also erred in holding that the said Circuit Court on the trial of this cause did not err in sustaining the objection made by the defendant in error to the testimony of William Robinson offered by the plaintiff in error, and that the said Circuit Court did not err in refusing to permit the plaintiff in error to call as witnesses Warren Decamp, Frank P. Sterling, John W. Eddy, John Langan and Joseph K. Toole, and to prove by them and each of them the several matters and things offered to be proven by them upon the trial of said cause.

(*h.*) This Honorable Court also erred in holding that the said Circuit Court did not commit error by refusing to permit the plaintiff in error to read in evidence to the jury the original complaint in case No. 2798, Old Series, of the records of the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis and Clarke, wherein William Robinson and others were plaintiffs, and Charles E. Mayger was the defendant, being the adverse claim suit referred to in the record of the specific performance case.

(*i.*) This Honorable Court erred in holding that the said Circuit Court did not commit error in granting plaintiff permission to amend the *ad damnum* clause in its complaint.

(*j.*) This Honorable Court erred in holding that the said Circuit Court did not commit error in overruling and denying the plaintiff in error's motion to direct a verdict in its favor on the trial of said cause.

(*k.*) This Honorable Court erred in holding in its opinion and judgment aforesaid that the Circuit Court aforesaid did not commit error in its charge to the jury, by telling them that "Defendant's answer then contains affirmative allegations which are not important in this trial, and therefore no further reference is made thereto."

330 (*l.*) This Honorable Court also erred in holding that the said Circuit Court for the District of Montana, did not commit error in giving to the jury upon the trial of this cause its instructions numbered 5, 7, 8, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 23 and 32.

(*m.*) This Honorable Court also erred in its judgment aforesaid in holding that the Circuit Court aforesaid did not commit error in refusing to instruct the jury as requested by the plaintiff in error in its instructions numbered 1, 2, 12, 16, 19, 21, 23, 28, 32 and 39.

(*n.*) Error also happened in the opinion and judgment aforesaid in that this Honorable Court refused to give full faith and credit to the judgment of the Supreme Court of the State of Montana in the specific performance case, and in that it refused to hold that the above named defendant in error was not estopped and enjoined in and by such judgment from claiming any mineral found in the said thirty foot strip or compromise ground, or from claiming any right to the possession of said ground or any part or portion thereof.

Your petitioner further shows that in this case the jurisdiction of the Circuit Court for the Ninth Circuit, District of Montana, was not dependent entirely or at all upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states, but that it was originally brought, as is shown by the complaint, pleadings and proceedings on the part of the defendant in error (plaintiff in the Court below) upon the proposition that there were questions arising in said action under the constitution and laws of the United States, in this, to-wit: whether the owner of a mining claim under the laws of the United States might
331 follow a vein beyond the side lines of his claim, the apex of which said vein entered and departed through the same side line of his claim; also the further question as to whether he might pursue said vein beyond his own side line when the same departed therefrom at an acute angle beyond a point where the whole of the said vein was within the lines of his own claim; and further whether under the laws of the United States a deed made by the owner of a mining claim for a part thereof, which contained no reservations or exceptions, but which expressly conveyed all the right, title and interest which the grantor had in the ground so conveyed, was insufficient to convey the right to pursue a vein on its dip, where he had still a part of the apex of said vein within his own claim, and also the further question of what faith or credit should be given to a judgment rendered by the highest court of a state in the courts of the United States.

Wherefore, Your Petitioner prays for an order allowing it to prosecute a writ of error from the Honorable Supreme Court of the United States to this Court, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which your petitioner shall give and furnish upon said writ of error, to operate as a supersedeas of the judgment rendered in said Circuit Court, and that upon the giving of such security that all further proceedings in this Court be suspended and stayed until the final determination of the said writ of error by the Honorable Supreme Court of the United States, and your petitioner as in duty bound will ever pray.

CHARLES J. HUGHES, JR.,
W. E. CULLEN,
Attorneys for Petitioner.

332 Let the writ of error prayed for in the foregoing petition issue, and further proceedings in this cause in this Court be stayed, upon the petitioner executing a good and sufficient bond in the sum of two hundred and fifteen thousand Dollars, conditioned as required by law.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) Petition for Writ of Error and Order that Writ issue etc. Filed Aug. 22, 1906. F. D. Monckton, Clerk.

333 In the Supreme Court of the United States.

THE MONTANA MINING COMPANY, LTD., Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Defendant in Error.

Comes now the above named Plaintiff in Error by Charles J. Hughes, Jr., and W. E. Cullen, its Attorneys, and assigns the following as errors upon which it will rely in the Supreme Court of the United States for the reversal of the opinion and judgment rendered and entered in *in* the above entitled action by the Court of Appeals for the Ninth Judicial Circuit on the 13th day of August, 1906, and for the reversal of the judgment of the Court below:

I.

The Honorable, the Court of Appeals for the Ninth Circuit, erred in holding that it was bound by the opinions rendered by it and reported in the one hundred and second Federal Reporter, Page 430, and the 104 Federal Reporter, 664, for that judgments which were rendered in pursuance of said opinions and which gave binding force to the same, were vacated and set aside by the judgment of the said Court rendered October 8th, 1902.

II.

That there was error in said opinion and judgment so rendered as aforesaid, in that it was held upon the strength of the two former opinions in this cause; that the second amended and supplemental complaint being the complaint upon which this action was tried,
334 did state facts sufficient to constitute a cause of action and did not state facts showing that the Plaintiff therein (the Defendant in Error here) had no cause of action.

III.

Error was likewise committed by said Court of Appeals in its opinion and judgment aforesaid, in holding that the Circuit Court of the United States for the Ninth Circuit District of Montana did not commit error in permitting testimony to be given on the trial of

said cause as to the existence of a discovery vein in the St. Louis Lode Mining Claim and as to the strike and dip of said vein no allegations with reference to such vein or its dip or strike being made in the complaint or in any wise being in issue in said action.

That the said Circuit Court of Appeals erred in holding that the Circuit Court aforesaid did not commit error

(*a*) In permitting the witness, William Mayger, to testify in answer to the following question:

Q. "Which direction does it run?"

To which question the Plaintiff in error objected on the ground that the same was irrelevant and immaterial for that the direction or strike of the discovery vein was not in issue, there being no allegation in the complaint relative to the strike or dip thereof.

(*b*) The Court of Appeals also erred in holding that the said Circuit Court did not err in permitting the said witness to testify that the St. Louis discovery vein ran very nearly parallel with the side lines of the St. Louis as staked; that it dipped to the East; that they had traced it to within 95 feet of the end line at the South end and within 400 feet of the North end.

(*c*) In holding that there was no error in permitting the witness, Walter Proctor Jenny, to testify, as follows:

"I have examined the discovery vein of the St. Louis Lode Mining Claim. Its course is substantially Northeast and Southwest. Explorations under ground shows that it lies within 750 feet
335 of the North end line and in the South end it is traced within 95 feet of the end line. The dip of the vein is from vertical to a dip of 85° to 90° Easterly."

The Plaintiff in Error having objected to said testimony and to the question eliciting the same for that the strike and dip of said discovery vein was not in issue.

(*d*) Error was likewise committed in permitting the witness, John R. Parks, to testify, as follows, to-wit:

"The discovery vein of the St. Louis is a gold bearing fissure vein running in the general direction of the side lines, the vein is developed both northerly and southerly from the Transcontinental Tunnel."

The said testimony and the questions in answer to which the same was given having been objected to by the Plaintiff in Error for the reasons aforesaid.

(*e*) The Court of Appeals also erred in holding that the Circuit Court did not err in permitting all of the other testimony shown in the Record relative to the discovery vein of Plaintiff's St. Louis Mining Claim, and its strike and dip, and permitting the same to be received in evidence over the objections of the Plaintiff in Error thereto.

IV.

The Court of Appeals likewise erred in holding in and by its decisions aforesaid that a mineral bearing vein the apex of which enters and departs through the same side line of a mining claim has, or can have extra-lateral rights under the Mining Laws of the United States.

V.

The Honorable, the Court of Appeals, likewise erred in holding by its judgments and opinions aforesaid, that the St. Louis Mining and Milling Company of Montana, was not estop-ed by the bond for a deed given by its predecessor in interest, the judgment rendered against it by the District Court of the State of Montana with-
336 in and for the County of Lewis & Clarke, wherein the said St. Louis Lode is located, in the specific performance case and by its deed made under and in pursuance of the Decree rendered in that case from claiming any right to mineral contained in the thirty foot strip or compromise ground, and this without reference to whether the Lode in which such mineral was found had its apex within or without the said thirty foot strip or compromise ground; and it further erred in holding that the said Defendant in Error was not expressly enjoined and restrained from claiming any right, title or interest in or to such mineral or any part or portion thereof.

VI.

The Honorable, the Court of Appeals, aforesaid, also erred in holding in and by its opinions and judgments aforesaid that the said Defendant in Error was entitled to pursue the Drumlummon vein on its dip downward between its so called 108 and 133 foot planes; and it erred in holding that the Circuit Court for the District of Montana did not err in permitting the witness, William Mayger, to testify as to the ground which had been stoped out by the Plaintiff in Error northerly of its so called 133 foot plane and to point out to the Jury on Plaintiff's Exhibit No. 1 where he claimed such stoping to have been done.

(*a*) Error was committed by said Court of Appeals by holding that said Circuit Court did not err in permitting the said witness to answer the following question, to-wit:

Q. "Point out to the Jury, westerly of the 133 foot plane, where the stopes have been taken out?"

(*b*) And in permitting the said Mayger over the objections of the Plaintiff in Error to testify as follows, to-wit:

"The entire vein is stoped out between the 108 and the 133 foot plane from the surface to the 190 foot level of the Montana Company's works.

(*c*) In permitting the Witness Parks to testify over objection, as follows:

"I have block No. 1 the stope South of the North line
337 of the Montana Company's apex shaft to the 133 foot plane and from the surface to the instrument at "K." It lies entirely within the boundaries of the compromise ground extended downward vertically. The block has an average width of 7 feet, is 21 feet long and 36.3 feet high." Also in holding that it was not error to receive the testimony of witnesses as shown by the Record with reference to Blocks 2, 3, 5, 6 and 7, all of which, as is shown by the testimony, lie wholly within the compromise ground and between Plaintiff's so called 108 and 133 foot planes; for that all

of said testimony was objected to by Plaintiff in Error and was inadmissible for the reason that the Defendant in Error did not have the whole of the apex of the Drumlummon vein within the surface boundaries of its Claim beyond its so called 108 foot plane, and that permitting it to pursue the vein between the two planes was a taking of the vein on its strike and was an unlawful interference with and an appropriation of 168 square feet of the surface of the compromise ground, property of the Plaintiff in Error.

VII.

The Court of Appeals erred in holding that the Circuit Court aforesaid, did not err in sustaining objection to the following question asked of the witness, John H. Farmer, by Plaintiff in Error, to-wit:

Q. Draw a line at right angles to that one (indicating the East line of the compromise ground) 50 feet from the center of the discovery shaft on the Nine Hour, where would it bring it on the map, that is, from the center of the discovery shaft on the Nine Hour and at right angles to the line between corners 2, and 3 of the St. Louis?

Said witness having testified that he was a Mining Engineer and had made the map (Defendant's Exhibit "E") about which he was testifying.

VIII.

The Court of Appeals erred in its holding that the Circuit Court did not err in refusing to permit the witnesses, John Langan,
338 William Robinson, Warren De Camp, F. P. Sterling, J. W. Eddy, and Joseph K. Toole, witnesses for Plaintiff in Error, to be called to the stand, and in requiring the Defendant to submit to the Court in an offer of proof what it expected to establish by the testimony of each of said witnesses, severally.

IX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit the Defendant to call to the witness stand John H. Farmer and to prove by him that he had read the complaint in the Adverse Claim Suit, brought by the Owners of the Nine Hour against the St. Louis Claim, which complaint is referred to in the complaint in the Specific Performance case; that he knew the description therein contained and that it represented an area of 1.98 acres. That he had platted the area in conflict on the map (Defendant's Exhibit "E") and that it included the 30-foot strip or the Compromise ground.

X.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objection made by plaintiff (Defendant in Error here) and in refusing to permit the defendant (Plaintiff in Error here) to prove by the witness William Robinson, present in Court, that he was the person who located the Nine Hour Claim

and the representative of his co-owner when the settlement of the Adverse Suit was made. That the whole area in conflict in that suit was 1.98 acres, the boundaries of which were accurately shown upon the map (Defendant's Exhibit "E"); and that all of the strip described in the bond was the easterly 30 feet of said 1.98 acres. That the instructions he received with reference to the settlement of said Adverse Claim suit from his co-owner De Camp, was that he was to retain the right to the ore beneath the Compromise ground without regard to where the apex of the lode was, in which said ore might be contained. That it was arranged with William Mayger representing Charles Mayger, that the Nine Hour claimants
339 were to have the 30-foot strip and, "All of the mineral therein contained" without regard to where the apex of the lode might be in which such mineral was contained. That this was the distinct understanding of the parties before the bond (Defendant's Exhibit "A") attached to its answer was drawn up. That said bond was drawn up by Messrs. Toole & Toole, who were the attorneys for William Mayger. That the witness, after said bond was drawn up, went to Joseph K. Toole with said bond and inquired of him whether the obligor in said bond could pay the penal sum named therein and avoid making conveyance of the said premises, and whether by its terms the bond gave to witness and his co-owners all of the mineral contained in said Compromise ground regardless of where the lead in which it was found might have its apex. That he knew where the east side line of the St. Louis Lode Mining Claim was prior to the time that he staked his Nine Hour Claim, and that the westerly line of the Nine Hour Claim was not within 25 feet on the south end and 50 feet on the north end of said St. Louis east side line. That after his discovery, the southeast corner stake of the St. Louis was moved up to a point near the east side line of his Nine Hour Claim, which point is correctly shown on defendant's map (Exhibit "E"). That when the St. Louis was surveyed for patent, such survey was started from its northeast corner stake and ran in the direction of the stake which had been moved to the point marked corner No. 2 on its survey, where a monument was put up, where no stake or monument had ever stood before, from which point the said side line had an angle to its corner No. 3. That the extension of said east side line of said St. Louis Claim over witness' Nine Hour Claim was wrongful and resulted in securing as a part of said St. Louis Mining Claim all of the area of said Nine Hour Claim embraced within said line, save and except the 30-foot strip.

XI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit the defendant to call (Plain-
340 tiff in Error here) Warren De Camp and to establish by him that he was a co-owner in the Nine Hour Claim, at the time that the Adverse Claim suit was pending; that he knew the settlement that was made and that he would not have consented thereto, but for the fact that the owners of the Nine Hour were to have the 30-foot strip, together with all of its mineral contents regardless of

where the apex of the lode in which such mineral so found, might be. That he knew of the wrongful extension of the east side line of the St. Louis over the Nine Hour, made at the time of the survey for patent of said claim. That he knew where the east line of the St. Louis was as originally staked, and the west line of the Nine Hour as that claim was staked, and that there was an interval of unclaimed territory between the two lines.

XII.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining plaintiff's objection to calling Frank P. Sterling, then in court, to the witness-stand and in refusing to permit the said defendant (Plaintiff in Error here), to prove by said Sterling that at the time Defendant's Exhibit "A" attached to defendant's answer herein was drawn, he was a lawyer, was interested in said Nine Hour Claim as a co-owner, that he understood the law of apex rights, that it was distinctly understood and agreed between the owners of the Nine Hour and of the owners of the St. Louis at the time said bond was made, that the owners of the Nine Hour should own all of the mineral contained in said 30-foot strip or Compromise ground, and that the owners or owners of the St. Louis, should not have the right to follow into such ground any lead, lode, ledge or vein having its apex within the surface boundaries of the St. Louis Claim. That the witness, William Robinson, after said bond had been drawn up, took it to Governor Joseph K. Toole to learn whether it relcived the ground known as the Compromise ground from the apex rights of the St. Louis Claim adjoining it. And that he, said Robinson, would not accept said bond until he had been so assured of said fact.

341 XIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objection made by the plaintiff to defendant's offer to prove by the witness John W. Eddy, that he was a co-owner in the Nine Hour Claim at the time of the settlement of the Adverse suit. That it was the distinct understanding between all of the parties to that settlement, that the Compromise ground was to be a piece of ground whose westerly line should be parallel to the lines of the St. Louis between corners numbered 2 and 3 and 50 feet distant from the center of the Nine Hour Discovery shaft. That no settlement or agreement would have been entered into by the obligees named in the said bond; but for the fact that the said obligees were to have all of the mineral contained in said ground without regard to where the apex of the vein might be in which such minerals were found.

XIV.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objections made by the plaintiff to the calling of John Langan, then in court, to the witness-stand, and in

sustaining its objection made to the offer of defendant to prove by said witness that he knew where the east line of the St. Louis Claim was originally located, and where the west line of the Nine Hour was located, and that he knew that there was a vacant space of unclaimed ground between the two lines. That he knew that the easterly line of the St. Louis was wrongfully extended over the Nine Hour.

XV.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing upon objection of plaintiff to permit the defendant to call Joseph K. Toole and in rejecting its offer to prove by said witness that the bond for a deed (Defendant's Exhibit "A") attached to its answer, was in his handwriting; that the words "Together with all the mineral therein contained," were inserted therein because that was the agreement of the parties at the
342 time said bond was drawn.

XVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit defendant to read in evidence the original complaint, and the replication in case No. 2798, Old Series, of the records of the District Court of the Third Judicial District of the Territory of Montana, within and for the County of Lewis & Clarke, wherein William Robinson, *et al.*, were plaintiffs and Charles F. Mayger was defendant, being the adverse Claim Suit referred to in the record in the Specific Performance Case, for the purpose of showing that the area involved was the 1.98 acres testified to as shown upon Defendant's Exhibit "E."

XVII.

The Court of Appeals erred in holding that the said Circuit Court did not err in overruling and denying defendant's motion to direct a verdict in its favor.

XVIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in telling them in the preliminary portion thereof that, "defendant's answer then contains affirmative allegations which are not important in this trial and therefore no further reference is made thereto."

XIX.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge in giving to the jury its instructions numbered 5, which said instructions is as follows, to-wit: "The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of

law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and the 133-foot planes, and therefore to that part of the Drumlummon vein in dispute, then
343 the defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

XX.

The Court of Appeals erred in holding that the said Circuit Court did not err in charging the jury as in its instruction No. 8, which said instruction is as follows, to-wit:

"If you find that the course of strike of the discovery vein in the St. Louis Mining Claim, as disclosed at the point of discovery or elsewhere is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location. And I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extralateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis Claim, between the 520 and the 133-foot planes, that the discovery vein of the St. Louis Claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis Claim between said planes generally lengthwise of the claim."

XXI.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving its instruction No. 17, which is as follows, to-wit:

"If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use quartz, rock and ore, within the planes belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of the said trespass cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespassers may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the
344 evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injury it has sustained."

XXII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in its instruction No. 18, which said instruction is as follows, to-wit:

"The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the moneys expended in the running of levels, sinking of shafts or development work, except, to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the Mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant, or any salaries paid to its officers, or any wages to any person, except to those actually employed and engaged in the extraction, transportation and milling of the ores in question."

XXIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving its instruction No. 19, which is as follows, to-wit:

"When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it
345 was a trespass upon said claim within its surface boundaries.

And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis Claim and the ore extracted therefrom."

XXIV.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury giving to said jury its 20th instruction, which is as follows, to-wit:

"If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and the 133-foot planes, and the value thereof, and that it did not do so, but took away from the plaintiff the means of proving the true and correct amount and value thereof, the law will aid the remedy against the wrongdoer and supply the deficiency of proof caused by the misconduct of defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find from the facts as above indicated, you are at liberty to follow the evidence given in behalf of plaintiff, as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence."

XXV.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving to said jury its 21st instruction, which is as follows, to-wit:

"As to the evidence disclosed by the books of the defendant and the abstract thereof, offered in evidence in behalf of defendant, I charge you that to entitle them to be considered as sufficient evidence to prove the value of the ore extracted from the Drumlummon vein, you must be satisfied that the ores taken from other parts of
346 defendant's mine, which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition."

XXVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in giving to the jury its 23rd instruction, which is as follows, to-wit:

"The law is well settled that if one wilfully places the property of another in a situation where it cannot be recovered, or its true amount of value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value *of* which the property in question can be reasonably estimated."

XXVII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury by giving to the jury its instruction No. 32, which is as follows, to-wit: "In considering any ore extracted from Block 8, part of which was removed under the authority of this Court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefore; on the other hand, if such facts are so disclosed you should make a deduction in accordance with the general rules laid down in the charge."

XXVIII.

The Court of Appeals erred in holding that the said Cir-
347 cuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. 1.

"The defendant having heretofore and on or about the 1st day of June, A. D. 1895, recovered a judgment and decree against the

above-named plaintiff in the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke, being the judgment and decree mentioned and set forth in the answer herein and in the evidence before you. And it not appearing from the testimony herein, that said judgment, in so far as it awards all of the mineral contained in the Compromise ground to the defendant herein, has been, or was at any time modified, reversed or so restricted in its meaning as to apply only to such mineral as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said Compromise ground, and, it appearing further, that in and by said judgment and decree, the plaintiff herein was forever barred from all interest or claim to said Compromise ground, or to any part or portion thereof or to the possession thereof, or of the mineral or any thereof. You are instructed that such judgment and decree absolutely concludes the plaintiff as to any and all mineral contained in said Compromise ground, whether the leads, lodes or veins wherein such mineral is found, have, or have not their apices within the surface boundaries of the plaintiff's St. Louis Claim or otherwise, and as for all alleged trespasses in said Compromise ground, you will not take the same into your consideration or return any verdict therefor.

The Court instructs you that in order to entitle a miner to follow a vein or lode, having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of such top or apex within his surface boundaries. In this case, the plaintiff alleges that between what it denominates its 108 and 133-foot planes, it has only a part of the top or apex of the Drumlummon Lode within its surface boundaries. The Court therefore instructs you that as between these two planes, the plaintiff would not have the right to follow this vein on its dip, and you will disregard all
348 testimony relating to ores mined on the dip of the vein between these two planes mentioned and demonstrated the 108 and 133-foot planes."

XXIX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. II, which said instruction is as follows, to-wit:

"It appearing that in and by the bond for a deed, a copy whereof is annexed to the defendant's answer herein, and by the judgment rendered on or about June 1st, 1895, in the District Court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke, in an action wherein the predecessor in interest of the defendant herein was plaintiff and the plaintiff herein was defendant, the plaintiff herein was precluded from asserting any right, title or interest in and to the Compromise ground, or to any and all mineral therein contained, the said plaintiff had neither the actual nor constructive possessioon of the ground in which the trespasses complained of are alleged to have been committed and is,

therefore not entitled to recover in this action. You are therefore instructed to return a verdict for the defendant."

XXX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XII, which said instruction is as follows, to-wit:

"It is alleged in the answer in this case that a judgment was duly rendered and given on or about the 1st day of June, A. D. 1895, in an action then pending in the District Court of the First Judicial District of the State of Montana, within and for the county of Lewis & Clarke, wherein the predecessor in interest of the defendant in this action was plaintiff and the plaintiff herein was de-
349 fendant. Whereby, it is claimed, that all of the mineral contained in the thirty-foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of the plaintiff by its replication filed in this action, that such judgment was rendered, but, it is alleged that it was confined to such mineral and such mineral only, as was or is found in leads or lodes having their tops or apices wholly within the surface boundaries of the said Compromise strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the Compromise ground was distinctly in issue in that case, as appears by the pleadings, which are in likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of the plaintiff's right to recover, for any and all ores which you may find that the defendant has mined within the surface boundaries of the Compromise ground extended downward vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff."

XXXI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XVI, which said instruction is as follows, to-wit:

"The section of the Mineral Land Act which grants to the owner of a mining claim the right of extralateral pursuit of a vein having its top or apex within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course, beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis Claim, introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extralateral right on the
350 Drumlummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim

of the defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extralateral right, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drumlummon vein, and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

XXXII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XIX, which said instruction is as follows, to-wit:

"The burden of proof in this case is on the plaintiff, and unless you find from a preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, then your verdict should be for the defendant."

XXXIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXI, which said instruction is as follows, to-wit:

"As I have already explained to you, plaintiff's extralateral rights on the Drumlummon vein, where the same is found within surface boundaries of its St. Louis Claim, is limited and controlled by the extralateral rights which you may find from the testimony it has, or would be entitled to on its discovery vein, should taht vein in its course, downward on its dip extend to and under the surface boundaries of the Nine Hour Claim. The law does not contemplate that the owner of a mining claim shall have a greater length of vein beneath the surface that he has length of apex of the vein on the surface.

351 For illustration, suppose that the plaintiff in the case, had only one hundred feet of the apex of its St. Louis Claim within the surface boundaries of its claim, and that it was so situated, with reference to the Nine Hour Claim, that on its dip downward and under the surface of that claim it would have extralateral rights; then it would only be entitled to one hundred feet in length along the course or strike of the vein in the Nine Hour Claim.

Applying these principles to the case at bar, the Court instructs you that if you should find from a preponderance of the testimony that the vein in the sixty five foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis Claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental tunnel or fissure, then plaintiff's extralateral rights on the Drumlummon vein are controlled by the length of the discovery vein of the St. Louis Claim and are practically coterminous therewith. To illustrate what I mean, suppose you should find that at the northerly end of the discovery vein of the St. Louis, it termi-

nates practically at the end of the northeasterly drift driven by plaintiff from the bottom of its sixty-five-foot shaft, then you would be authorized to draw an imaginary line from said point to the Drumlummon vein, at right angles to the general course or strike of said Drumlummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extralateral rights, on the Drumlummon vein.

Then should you further find, from a preponderance of the testimony that plaintiff's discovery vein on its westerly course practically terminates at the Transcontinental tunnel or fissure, then a line drawn at right angles to the general course of the Drumlummon vein to such westerly point of termination of the St. Louis discovery vein, will mark the termination of plaintiff's extralateral rights in said Drumlummon vein, no matter how much further to the southward the whole, or a part of the apex of the Drumlummon vein may be found within the St. Louis Claim."

352 XXXIII.

The Court of Appeals erred in holdin- that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXIII, which said instruction is as follows, to-wit:—

"If you should find from the testimony that the vein in the sixty-five-foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental tunnel, and that the vein found in the sixty-five-foot shaft passes through the fissure shown in the Transcontinental tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence, that such vein continues on its course through its St. Louis Claim, and passes out of the south end line of its claim, or practically does so. If you should find from the evidence that the fissure shown in the south side of the Transcontinental tunnel at a point a little westerly of the point where the vein from the sixty-five-foot shaft intersects said tunnel is the same fissure as that in which the vein in the sity-five-foot drift is found, but that it only extends into the wall of the tunnel for a few feet and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental tunnel as practically the southerly end of the plaintiff's said discovery vein, and your verdict should be for the defendant."

XXXIV.

The Court of Appeals erred in holding that said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXVI. which said instruction is as follows, to-wit:—

"The Court instructs you that your first duty is to examine and ascertain what, if any extralateral rights attach to the dis-
353 covery vein of the plaintiff's St. Louis Claim. In the first place you must ascertain which of the surface lines, are, in

law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them on the ground, or named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practically parallel to the course of the discovery vein as it passes through the claim. For example, if you should find from the evidence that the discovery vein of the St. Louis Claim was in what has been denominated the 65-foot shaft, and that the vein therein discovered, on its course or strike through the claim, would pass out of the surface boundaries of the St. Louis, between corners numbered one and two thereof, and that following said course in a southwesterly direction, it would pass out of the westerly boundary of the said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this case would terminate, when you had found that fact. This is so, because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which he first discovered and upon which he made his location, was substantially parallel to the easterly boundary line of his claim, before you would be justified in awarding him extralateral rights on the Drumlummon vein, or on so much of it as has its apex inside of the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis ground through the easterly boundary thereof, then, in whatever direction it might dip, it would not have extralateral rights within or under the Nine Hour Claim, and extralateral rights could not be claimed for the Drumlummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled
354 to all the Drumlummon lode found within the surface boundaries, but they could not pursue on its dip an inch beyond the easterly line of the St. Louis Claim, extended downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him extralateral rights under the Nine Hour Claim, it is plaintiff's misfortune, and one which neither this Court nor this jury can correct. Mr. Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made. He should have staked his claim along the strike of the vein, and not across it."

XXXV.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXVIII which said instruction is as follows, to-wit:

"It conclusively appears by the testimony in this case, and it is an undisputed fact that the Compromise ground or the 30-foot strip as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode Mining Claim. The Court there-

fore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis Claim was first located and first patented. Having been patented as a part of the St. Louis, the Compromise ground is to be regarded as standing exactly on the same plane, so far as priority is concerned, with every part of the St. Louis Claim."

355 XXXVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as reuqested by the defendant in its instruction No. XXXII, which said instruction is as follows, to-wit:

"Because the so-called compromise strip was patented as a part of the St. Louis Lode Mining Claim, and afterward deeded to the defendant company or its predecessor, I instruct you that the extra-lateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis Claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour, does not involve any admission on the part of the defendant that the portion of the St. Louis Claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis company to follow the vein to depth in this action must be limited by what is called the 108-foot plane, or the departure point of the hanging-wall and that there can be no recovery in this case for any ores extracted South of the 108-foot plane."

XXXVII.

The Court of Appeals erred in holding that the verdict in said case in the Circuit Court was not grossly excessive and apparently the result of passion or prejudice and that the judgment rendered thereon and said verdict were not excessive and were supported by the evidence given in said cause on the trial thereof; the said verdict and judgment being grossly excessive and unsupported by the testimony in said cause and contrary thereto.

356 Wherefor- the above named plaintiff in error the said The Montana Mining Company Limited, prays that the judgment of the Circuit Court of the United States, for the district of Montana, and the judgment of the Court of Appeals for the Ninth Circuit be reversed and set aside and that by the proper order of this Court the said Circuit Court and the said Court of Appeals be directed to enter an order setting aside the verdict and judgment aforesaid and dis-

missing the said action with costs and that the plaintiff in error have such other and further relief as it may be entitled to.

CHARLES J. HUGHES, JR.,
W. E. CULLEN,
Att'y. for Plaintiff in Error.

(Endorsed:) Assignment of Errors. Filed Aug. 22, 1906. F. D. Monckton, Clerk.

357 In the Supreme Court of the United States.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING & MILLING COMPANY OF MONTANA, Defendant in Error.

Know all men by these presents, That we, the Montana Mining Company, Limited, a Corporation organized under the laws of Great Britain, and doing and entitled to do business in the State of Montana, as principal, and the Union Bank & Trust Company, a corporation, organized under the laws of the State of Montana, and qualified to be a surety on judicial bonds in the Courts of the United States, as surety, are held and firmly bound unto the Saint Louis Mining & Milling Company of Montana in the full and just sum of Two Hundred Fifteen Thousand Dollars ($215,000.00), to be paid to the said Saint Louis Mining & Milling Company of Montana, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 18th day of August, A. D. 1906.

Whereas, lately at a term of the Circuit Court of Appeals for the Ninth Circuit, in a suit depending in said Court, between the Montana Mining Company, Limited, plaintiff in error, and the St. Louis Mining & Milling Company of Montana, defendant in error, a judgment was rendered on the 13th day of August, 1906, against the said, the Montana Mining Company, Limited, affirming a judgment for the sum of one hundred and ninety five thousand
358 dollars ($195,000), and nine hundred and twenty-six & 80/100 dollars ($926.80) costs of suit, rendered against it in the United States Circuit Court for the District of Montana, and the said the Montana Mining Company, Limited, having obtained from the chief judge of said Circuit Court of Appeals, a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said the St. Louis Mining & Milling Company of Montana, citing and admonishing it to be and appear at a United States Supreme Court to be held at the City of Washington, in the District of Columbia, within thirty days from the date thereof,

Now, therefore, the conditions of this obligation is such that if the above named the Montana Mining Company, Limited, shall prosecute its said writ of error to effect, and answer all damages and costs

if it fail to make its plea good, then the above obligation to be void, otherwise the same shall remain in full force and virtue.

MONTANA MINING COMPANY, LIMITED,
[SEAL.] By ALEXANDER BURRELL,
Manager and Attorney in Fact.
UNION BANK AND TRUST COMPANY,
By GEORGE L. RAMSEY, *President.*

[SEAL.] Attest: R. O. KAUFMAN, *Secretary.*

Sealed and delivered in presence of:
F. W. HALL.
H. E. BRAN.

359 P. N. Lilienthal, Manager of the Anglo-Californian Bank, Limited, of San Francisco, California, is our duly appointed agent in an- for the Northern District of California, upon whom all lawful process in any action or proceeding against the company may be served.

360 Whereas, the Union Bank and Trust Company, a corporation, duly incorporated under Sec. 604, as amended, of the Civil Code of the State of Montana, has deposited with the Attorney-General its articles of incorporation and the statement required by Section 3 of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as sole surety on recognizances, stipulations, bonds, and undertakings permitted or required by the laws of the United States to be given with one surety or with two or more sureties, and has satisfied me that it has authority under its charter to do the business provided for in the Act last mentioned; that it has paid up capital of not less than $250,000 in cash or its equivalent; and that it is able to keep and perform its contracts:

Now, therefore, the said Union Bank and Trust Company is hereby granted authority to do business under said Act in the State of Montana, and also beyond the limits of said State in any judicial district of the United States in which it shall first have appointed an agent conformably to the provisions of Section 2 of said Act.

[SEAL.] M. D. PURDY,
Acting Attorney-General.

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *July* 24, 1905.

The above is a true copy of an original authorization to do business, issued by the Attorney General under the Act of Congress approved August 13, 1894.

Witness my hand and the seal of the Department.

[SEAL.] M. C. MASTERSON,
Acting Chief Clerk.

361 STATE OF CALIFORNIA, *City and County of San Francisco*, ss:

Jesse W. Lilienthal, being first duly sworn, says: I am the brother of P. N. Lilienthal, Manager of The Anglo-Californian Bank, Limited, of San Francisco, California, whose residence is in said City and County.

The said P. N. Lilienthal has been appointed and is now Agent of the Union Bank and Trust Company, a corporation, organized under the laws of the State of Montana, and qualified to become a surety on judicial bonds in the Courts of the United States, and is authorized by said Union Bank and Trust Company to receive service of process for and on its behalf.

JESSE W. LILIENTHAL.

Subscribed and sworn to before me this 22nd day of August, A. D. 1906.

[SEAL.] EUGENE W. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

Form of bond and sufficiency of surety approved this 22nd day of August, A. D. 1906.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) Supersedeas Bond on Writ of Error to Supreme Court. Filed Aug. 22, 1906. F. D. Monckton, Clerk.

362 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1240.

THE MONTANA MINING COMPANY, LIMITED, Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Proceedings, etc.

I, Frank D. Monckton, Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-seven (77) pages, numbered from one (1) to seventy-seven (77), inclusive, to be a true copy of the assignment of errors and of all proceedings had in the above entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed therein, as the same remain of record in my office, and that the same in connection with the preceding certified copy of the Printed Transcript of Record constitute a true copy of the record, and in connection with the accompanying original exhibits, viz: Plaintiff's Exhibits: 1, 4, 9, Complainant's Exhibit: 3,

and Defendant's Exhibits: C, D, E, F, G, H, I, L, and M, constitute the transcript of record upon return to the annexed writ of error.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 17th day of September, A. D. 1906.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

363 UNITED STATES OF AMERICA, *ss:*

To the St. Louis Mining and Milling Company of Montana, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, within sixty days from the date hereof, pursuant to a writ of error duly issued out of the clerk's office of the United States circuit court of appeals for the Ninth Circuit, wherein the Montana Mining Company, Limited, is the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness William W. Morrow, U. S. circuit judge & judge of the United States circuit court of appeals for the ninth circuit, this 22nd day of August, in the year of our Lord, one thousand nine hundred and six.

WM. W. MORROW,
Circuit Judge.

364 [Endorsed:] Docketed No. 1240 United States Circuit Court of Appeals for the Ninth Circuit The Montana Mining Company, Limited *vs.* The St. Louis Mining and Milling Company of Montana. Citation on Writ of Error. Filed August 31, 1906. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

Received a copy of the within citation this — day of August, 1906.

ARTHUR BROWN,
BACH & WIGHT,
M. S. GUNN, &
J. B. CLAYBERG,
Att'ys for Def't in Error.

365 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greetings:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you, or some of you, between The Montana Mining Company, Limited, plaintiff in error *vs.* The St. Louis Mining and Milling Company of Montana defendant in error, manifest error hath happened, to the great damage of the said The Montana Mining Company, Limited, plaintiff in error, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, within sixty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 22nd day of August, in the year of our Lord, one thousand nine hundred and six.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Allowed by
WM. W. MORROW,
Circuit Judge.

366 [Endorsed:] Docketed. No. 1240. United States Circuit Court of Appeals for the Ninth Circuit. The Montana Mining Company, Limited, *vs.* The St. Louis Mining and Milling Company of Montana. Writ of Error. Filed August 31, 1906. F. D. Monckton, Clerk U. S. Circuit Court for the Ninth Circuit.

Received a copy of the within writ of error this — day of August 1906.

ARTHUR BROWN,
BACH & WIGHT,
M. S. GUNN, &
J. B. CLAYBERG,
Att'ys for Def't in Error.

Return to Writ of Error.

The Answer of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within named defendant in error.

By the Court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

Endorsed on cover: File No. 20,367. U. S. circuit court of appeals, ninth circuit. Term No. 402. The Montana Mining Company, Limited, plaintiff in error, *vs.* The St. Louis Mining and Milling Company of Montana. Filed September 22, 1906. File No. 20,367.

FILE COPY.

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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, DEFENDANT IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION OF PLAINTIFF IN ERROR TO ADVANCE CAUSE AND NOTICE OF MOTION.

CHARLES J. HUGHES, JR.,
W. E. CULLEN,
Attorneys for Plaintiff in Error.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23707

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, DEFENDANT IN ERROR.

Comes now the above named plaintiff in error, by Messrs. C. J. Hughes, Jr., W. E. Cullen, Aldis B. Browne and Alexander Britton, its attorneys, and moves the court to advance the above-entitled cause on its calendar and to set the same down for hearing on the merits at as early a day as is practicable, and to postpone the hearing of the petition of the above named plaintiff in error for a writ of mandamus, and for other relief, now pending, until the argument of the said cause upon the merits.

This motion is based upon the rules of practice of this court, upon the former writ of error in said cause, which was fully argued to the court when heretofore submitted (186 U. S., 24), and also upon the record herein, including said petition for mandamus.

The purpose of this motion is to relieve the court from the necessity of twice hearing argument in this cause, inas-

much as the argument upon the return to the pending rule will necessarily embrace much of the case, in order to properly present the same.

Respectfully submitted,

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
Attorneys for Plaintiff in Error.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

Service of copy acknowledged this 1st day of November, 1906.

ARTHUR BROWN,
CLAYBERG & GUNN.
THOS. C. BACH,
For Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED, *Plaintiff in Error,*

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, *Defendant in Error.*

To the above-named Defendant in Error and Messrs. ARTHUR BROWN, J. B. CLAYBERG, and M. S. GUNN, *Its Attorneys.*

GENTLEMEN: You will please take notice that we have filed in the office of the clerk of said Supreme Court a motion to advance the above-entitled cause on the record of this court, and to set the same down for hearing on the merits at an early date, a copy of which said motion is herewith served upon you. And the said cause will be brought on for hearing on said motion, in the court room of said Supreme Court, in the city of Washington, District of Columbia, on Monday, the 5th day of November, A. D., 1906, at the hour of 12 m., or as soon thereafter as counsel can be heard.

Very respectfully,

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
Attorneys for Plaintiff in Error.

A. B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

Service of copy acknowledged this 1st day of November, 1906.

ARTHUR BROWN,
For Defendant in Error.

FILE COPY.

FILED
NOV 12 1906
[illegible] KEENEY,
CLERK.

SUPR[illegible] STATES.

[illegible]

THE [illegible] COMPANY

[illegible]

[illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, DEFENDANT IN ERROR.

Motion for Certiorari for Diminution of Record under Rule Fourteen.

Comes now the said The Montana Mining Company, Limited, plaintiff in error, by Charles J. Hughes, Jr., W. E. Cullen, Aldis B. Browne and Alexander Britton, its counsel, and suggests diminution of the record in this case in this, to wit:

(1) That the record on file in this cause does not contain a copy of the original complaint filed by the above-named defendant in error in this cause, on the commencement of said action, on or about the 16th day of September, 1893. Nor does it contain a copy of the first amended complaint filed in said action by the defendant in error on or about the 21st day of November, 1898.

(2) And the said Montana Mining Company, Limited, plaintiff in error, by its counsel as aforesaid, in support of said motion, respectfully shows and states that under the Statutes of the State of Montana and the practice of the courts therein established an amended pleading takes the place of and supplants the prior pleading, and this is the practice in the circuit court of the United States for the said district of Montana; that the said cause was tried in said court upon the amended and supplemental complaint, which appears in the record herein, and that such supplemental complaint was, in all respects, sufficient upon the writ of error sued out from the circuit court of appeals of the ninth circuit to the said circuit court of the ninth circuit for the district of Montana, but that it is necessary, in order to ascertain the ground or grounds upon which the federal jurisdiction in this cause was originally invoked, that the record in that court should contain a copy of said original complaint (Mexican Central Ry. Co. *vs.* Pinkney, 149 U. S., 194), and that a copy of said first amended complaint is and will be necessary to enable the plaintiff to present properly a certain objection appearing in the record herein.

Wherefore the said The Montana Mining Company, Limited, plaintiff in error, moves the court, under rule XIV, to award a writ of certiorari to be issued and directed to the judges of the United States circuit court of appeals for the ninth circuit, commanding them that, searching the record and proceedings in said cause, they forthwith certify to this court a copy of the said original complaint filed in this cause on or about the 16th day of September, A. D. 1893, and also a copy of said first amended complaint filed on or about November 21st, 1898, both of which said complaints are so omitted as aforesaid.

W. E. Cullen,
Chas. J. Hughes, Jr.,
Aldis B. Browne,
Alexander Britton,
Counsel for Plaintiff in Error.

DISTRICT OF COLUMBIA, *ss:*

W. E. Cullen, being first duly sworn, says: I am an attorney and counsellor at law and have been admitted to practice in the courts of the State of Montana, and also in the United States circuit court of the ninth circuit for the district of Montana. I am likewise one of the attorneys for the above-named plaintiff in error. I have read the foregoing motion, and know the contents thereof, and the facts therein stated are true, to the best of my knowledge, information and belief.

W. E. CULLEN.

Subscribed and sworn to before me this 7th day of November, A. D. 1906.

[SEAL.] FERDINAND ESPEY,

Notary Public in and for the District of Columbia.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED, *Plaintiff in Error,*

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, *Defendant in Error.*

Motion for Certiorari for Diminution of Record Under Rule Fourteen.

To the above-named The St. Louis Mining and Milling Company of Montana, Defendant in Error, and Messrs. Arthur Brown, J. H. Ralston, M. S. Gunn, F. L. Siddons, W. E. Richardson, Thomas C. Bach, and Ira T. Knight, Counsel for Defendant in Error.

GENTLEMEN: Please take notice that we have filed in the office of the clerk of said Supreme Court a motion for a writ of certiorari in the above-entitled cause, copy of which motion is herewith served upon you, and that we will bring the said motion on to be heard in the court room of said Supreme Court in the city of Washington, District of Columbia, on Monday, the twelfth day of November, A. D. 1906, at the hour of 12 o'clock M., or as soon thereafter as counsel can be heard.

Very respectfully,

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
A. B. BROWNE,
ALEXANDER BRITTON,
Attorneys for Plaintiff in Error.

Service of the foregoing notice and motion accepted this 7th day of November, 1906.

JACKSON H. RALSTON,
For Defendants in Error.

FILE COPY.

FILED.
NOV 28 1906
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PETITIONER,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY,
RESPONDENT.

MOTION AND PETITION FOR WRIT OF CERTIORARI.

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23912

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PETITIONER,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY,
RESPONDENT.

Comes now The Montana Mining Company, Limited, by Charles J. Hughes, Jr., W. E. Cullen, Aldis B. Browne, and Alexander Britton, its counsel, and moves this honorable court that it shall, by certiorari or other proper process directed to the honorable the judges of the United States Circuit Court of Appeals for the Ninth Circuit, require said court to certify to this court, for its review and determination, a certain cause in said court of appeals lately pending, wherein the said The Montana Mining Company, Limited, was plaintiff in error and the said The St. Louis Mining and Milling Company of Montana was defendant in error; and to that end it now tenders herewith its petition and brief upon the certified copy of the entire record in said cause in said court of appeals and now here before this honorable court in the said cause numbered 402 on the docket of this court.

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED, PETITIONER,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, RESPONDENT.

The petition of the above-named The Montana Mining Company, Limited, respectfully shows and states:

1. That at all times hereinafter mentioned your petitioner was, ever since has been, and yet is a corporation duly incorporated and organized under the laws of the Kingdom of Great Britain, and as such corporation and by virtue of its compliance with the laws of the Territory and State of Montana was and is duly authorized to carry on and conduct the business of mining for the precious metals in said State, and to have, own, possess, and enjoy mines, mining claims, and other real estate in said State of Montana.

That The St. Louis Mining and Milling Company of Montana (hereinafter in this petition, for brevity, called the St. Louis Company) is likewise, as your petitioner is informed and believes, a corporation duly organized under the laws of the State (then Territory) of Montana.

The Original Complaint.

2. That heretofore, to wit, on or about the 16th day of September, A. D. 1903, the aforesaid The St. Louis Company commenced an action in the Circuit Court of the United States for the Ninth Circuit, District of Montana, against your petitioner and Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Francis Howkins; that all of said defendants except your petitioner were at the date of the commencement of said action and the service upon them of the summons therein residents of the town of Marysville, Montana, and citizens of the State of Montana. In said complaint it was alleged that the plaintiff therein, the said The St. Louis Company, was the owner of, in the possession of, and entitled to the possession of the St. Louis Quartz Lode mining claim, situate in Ottoway mining district, in the county of Lewis and Clark, State of Montana, particularly describing the same by metes and bounds and deraigning its title thereto from one Charles Mayger, who, as it was alleged, had obtained a United States patent therefor and subsequently deeded the said claim to the said The St. Louis Company; and it was therein alleged that the said The St. Louis Company was the owner, in possession of, and entitled to the possession of all the veins, lodes, or ledges having their tops or apexes or "having *any part* of their tops or apexes" within the surface boundaries of the St. Louis mining claim, as thereinbefore described, as against the said defendants, with the right to follow the same on the dips or angles thereof laterally from the place of intersection of any portion of the tops or apexes of said veins with the side lines of the surface location of its said mining claim, ascertained and defined by vertical planes extended downward parallel with the end of its said mining claim at the place of intersection thereof with any portion of said tops or apexes of such veins, lodes, or ledges.

It was further alleged that said defendants, on or about the 30th of June, 1893, had wrongfully, unlawfully, and wilfully entered upon one of the veins, lodes, or ledges bearing gold, silver, lead, and other precious metals and so having its top or apex within the surface location of the said mining claim of plaintiff and within the vertical planes aforesaid, and which said vein or lode, having continued in its strike for some distance parallel with the said boundaries aforesaid, passed out of the eastern side line of said mining claim, and which vein had its dip or angle in an easterly direction and in its course passed outside of vertical planes extended downward upon said east line of said mining claim near the southern portion thereof, and in its dip or angle entered beneath the property claimed or pretended to be claimed by the defendants or some of them, and that in utter disregard of the right and title of plaintiff the said The St. Louis Company, the defendant, had been and then was extracting and taking therefrom large quantities of quartz rock and ore bearing gold, silver, lead, and other precious metals, and converting the same to its own use and benefit, to the damage of the plaintiff, the said The St. Louis Company, in the sum of two hundred thousand dollars.

And your petitioner further shows that there was no allegation of the diverse citizenship of the parties to said action contained in said complaint, nor did such diversity of citizenship exist as between the said The St. Louis Company and said defendants, with the exception of your petitioner, all of the personal defendants being, as aforesaid, citizens of the State of Montana, of which said State the said The St. Louis Company was likewise a citizen; and so your petitioner on its information and belief says and alleges that the said The St. Louis Company did not invoke the jurisdiction of the said circuit court by reason of the diverse citizenship of the parties, but because the determination of the issues in said complaint offered and the rights claimed, and the rights of the parties thereto could only be determined by the proper

construction and application of a statute of the United States, to wit, the Mineral Lands Act.

Amended Complaint.

3. The said The St. Louis Company, on motion and by leave of court, filed an amended complaint in said action on or about the 21st day of November, 1898. In this amended pleading the personal defendants were omitted from the title and your petitioner alone was charged with the trespass complained of in the original complaint. It contains the same general allegations of ownership of the St. Louis claim as are found in the original complaint, but only asserts ownership of such quartz mineral bearing rock or ore as may be found in such veins "the tops or apexes of which lie within the surface lines of the said *fractional* portion of said St. Louis Lode mining claim." It then proceeds to describe its St. Louis claim by metes and bounds, as in its original complaint, and from its general claim of ownership of surface and mineral contents of the ground it makes the following exception:

> "Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis Lode mining claim is described as follows, to-wit:
>
> "Commencing at a point from which the centre of the discovery shaft of the Nine Hour lode bears south thirty-nine degrees thirty-two minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners 2 and 3 fifty feet distant; thence north fifty degrees twenty-eight minutes east on a line parallel to the aforesaid boundary line of the St. Louis lode between corners 2 and 3 thereof, two hundred and twenty-six feet to a point on the boundary line of the St. Louis lode between corners 1 and 2; thence south twenty degrees twenty-

eight minutes west along said boundary between corners 1 and 2 sixty and five-tenths feet to corner No. 2 of the St. Louis lode; thence south fifty-one degrees thirty minutes west four hundred and three feet to corner No. 3 of said St. Louis lode; thence north forty-five degrees thirty minutes west along the line of boundary of the said St. Louis lode between corners 3 and 4 thirty feet to a point; thence north fifty degrees twenty-eight minutes east along a line parallel to the boundary line of the St. Louis lode, between corners 2 and 3, two hundred and thirty feet to the point of beginning, including an area of about 12,844.50 square feet, *together with all minerals contained therein.*

"That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode mining claim, situate and being east of the said St. Louis Lode mining claim and including the thirty-foot strip or compromise ground aforesaid."

A further amendment was to describe, with reasonable accuracy, the vein it was claiming the right to pursue, beyond the side line of its claim extending downward vertically and into and under the compromise ground just described. In doing so it shows with definiteness and certainty the federal questions in the case by virtue of which it invoked federal jurisdiction of its case. It shows that the top or apex of the vein in which it claims extralateral rights enters the east line of its claim at a point 520 feet southerly from the northeast corner or survey corner No. 1 of its claim; that it continues along the east side line of its St. Louis claim between its survey corners Nos. 1 and 2, and passes out of its said claim through the west line of the compromise ground, and that at a point on said line 108 feet southerly from its survey corner No. 2 the hanging wall of said vein cuts said west line of the compromise ground, and the top or apex of the vein begins to pass out of the St. Louis claim; that it, The St. Louis Company, has a part of such apex for

an additional twenty-five feet southerly along said west line of the compromise ground, at which point the foot wall of the vein cuts said line and the top or apex of the vein has passed wholly outside the surface boundaries of its St. Louis claim. In short, it defined in part at least two of the federal questions there were in the case, by virtue of which it had originally sought federal jurisdiction of its case. No discovery or other vein was shown to exist within the surface boundaries of the St. Louis claim, either by the allegations of the pleading or by the map or diagram attached to it, showing the entry and departure of both the foot and hanging walls through the east boundary line of the claim. It clearly showed that from the beginning the plaintiff claimed extralateral rights on a vein which entered its claim and departed therefrom through the same boundary line; that it passed out of its claim at an acute angle, and that it was claiming the right of extralateral pursuit for a distance of twenty-five feet where it did not have the whole of the apex within its surface boundaries; that from its so-called 108-foot plane it claimed the right to take the vein on its strike from that point to a point where a line drawn at right angles to the strike of the vein would intersect the foot wall, and that it also claimed the right to take from your petitioner and appropriate to its own use so much of the surface of the compromise ground as would be embraced in a triangle whereof the west line of the compromsie ground would be the base, the line of the foot wall the perpendicular, and a line drawn from the 108-foot plane to the foot wall at right angles to the strike of the vein would be the hypothenuse, embracing an area of about 186 square feet.

The Compromise Ground.

4. That portion of the St. Louis claim which in said amended pleading is referred to as being "that portion thereof known as the thirty-foot strip or compromise ground" originated in this way. The St. Louis lode was located

by Mr. Charles Mayger on the 28th day of September, 1878. It was of statutory regulation size, a parallelogram fifteen hundred feet in length by six hundred feet in width. A copy of the declaratory statement, which was filed for record, appears in the transcript of record in case 402 of October term, 1906, of this court, which is a case in error wherein your petitioner is plaintiff in error and the said The St. Louis Company is defendant in error. Reference to this declaratory statement, which is found on pages 38 and 39 of said transcript of record, shows that, as originally staked and located, the claim was a four-sided figure; it had four corners and no more. Where these four corners were originally placed by Mr. Mayger is also shown by the diagram of the claim found in the patent for it. A copy of the diagram appears in the transcript of 402 opposite pages 40 and 140. They are alike, except that the one opposite page 140 of the record is on a larger scale. Turning to it, a dotted line will be noticed extending southerly or southwesterly from the northwest corner of the claim to a point marked "Loc. Cor."

That was the northwest and the southwest corners of the claim as originally staked, and the east line was parallel to it and not to exceed 600 feet east of it, or farther up the hill. The diagram shows the northwest and northeast corners to be in place—that is to say, original location corners—and the distance between them is 579 feet. The southern line parallel to this could not have been much longer, and in no event could have exceeded 600 feet in length.

Your petitioner further shows that after the location of the St. Louis mining claim the predecessor in interest of your petitioner discovered, staked, and had recorded the "Nine Hour mining claim;" that the same was so located to the east of said St. Louis claim, the westerly side line of the Nine Hour being fifty feet east of the east line of the St. Louis at the northerly end of the Nine Hour claim and twenty-five feet east of the east line of said St. Louis at the south end of the said St. Louis claim—that is to say, there

was a strip of unclaimed territory fifty feet at the north end and twenty-five feet at the south end lying between the east line of the St. Louis and the west line of the Nine Hour, as the claims were originally staked; that prior to the survey for patent the southeast corner stake of the St. Louis was moved and planted on the Nine Hour ground at a point where dotted projection of the line between corners No. 1 and 2 would meet the dotted line from where the southwest location corner is shown to have stood on the diagram before referred to opposite page 140 of the transcript in 402; that when the survey for patent of the St. Louis claim was made it was started at the northeast corner of said claim and was run toward the point at which the southeast corner stake of the St. Louis claim had been wrongfully and fraudulently removed to, as aforesaid, for a distance of 1,097 feet, to the point marked on said diagram "Cor. 2;" that at the point last aforesaid a mineral corner was put in where no stake or monument of any kind had ever stood before and was marked as corner No. 2 of the St. Louis survey; that at said corner No. 2 an angle or turn to the west was made and corner No. 3 of said survey was put in on the Nine Hour ground. In this way the St. Louis was made to overlap the Nine Hour to the extent of 1.98 acres, and included in such overlap was more than 600 feet of the apex of the Drum Lummon lode (Trans. of Record 402, pp. 63, 64).

Thereupon, and when application was made in the United States land office to enter the said St. Louis mining claim, the said William Robinson and others, predecessors in interest of your petitioner, filed an adverse claim for the said area which had been so wrongfully included, as aforesaid, within the boundaries of the St. Louis mining claim, and thereafter, and within the time allowed by law therefor, commenced an action in the District Court of the First Judicial District of the State of Montana within and for the County of Lewis and Clark, against the said Charles Mayger

for the purpose of determining the right to the possession of the area so in conflict.

That thereafter and on or about the 7th day of March, A. D. 1884, the said suit was compromised by an agreement between the parties that the St. Louis claim should go to patent as surveyed, and that when patent was obtained for the same the said Charles Mayger should and would deed to the said Robinson *et al.* a strip of ground between corners No. 2 and 3 as surveyed, said strip being particularly described as follows:

> "Commencing at a point from which the centre of discovery shaft of the Nine Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners 2 and 3, fifty feet distant; thence north 50 degrees 28 minutes east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim between corners 2 and 3, 226 feet to a point on the boundary line of the St. Louis Lode claim between corners 1 and 2; thence south 20 degrees 28 minutes west along said boundary line between corners 1 and 2, 60.5 feet to corner No. 2; thence 400.31 feet to corner No. 3 of the St. Louis lode; thence north 46 degrees 10 minutes west along the line of boundary of St. Louis Lode claim between corners 3 and 4, 30 feet distant to a point; thence north 50 degrees 28 minutes east along and parallel to the boundary line of the St. Louis lode between corners 2 and 3, 230 feet to the point of beginning, including an area of about 12,844.50 square feet, together with all the mineral therein contained" (Trans., p. 10).

And it was distinctly agreed between the parties that the obligees named in said bond should have all of the mineral contained in the area so to be deeded, as aforesaid, without reference to where the apex of the veins might be in which such mineral was found, and the words *"together with all the mineral therein contained"* were inserted in the bond for

a deed for such ground to express that portion of the agreement of the parties.

That thereupon the said Charles Mayger made, executed, and delivered to the said William Robinson *et al.* a certain bond for a deed, a true copy whereof is found in the record in No. 402, page 9 thereof, to which your petitioner prays that reference may be made as if herein specifically set forth.

That thereupon and after the execution and delivery of said bond for a deed the said Robinson *et al.* dismissed their said action in the court and withdrew their adverse claim in the land office and permitted the said ground to be surveyed and entered as a part of the St. Louis lode under the application already made in the land office.

And your petitioner further shows and states that thereafter, and without the consent of Robinson or the other owners of the land and contrary to his covenants and agreements contained in said bond, the said Mayger deeded the said strip of land to the St. Louis Company, and thereafter, and after the said Mayger had received a United States patent for the said St. Louis mining claim, your petitioner, who had succeeded to the rights of the said Robinson *et al.* made a demand upon the said The St. Louis Company for such deed, but it would not and did not convey the said premises as in and by the said bond for a deed its predecessors in interest had covenanted to do, and thereupon, to enforce the specific performance of the said contract, your petitioner commenced an action in the District Court of the First Judicial District of the State of Montana within and for the County of Lewis and Clark against the said Mayger and the said The St. Louis Mining and Milling Company of Montana, and then and there such proceedings were had as that on or about the first day of June, 1895, the judge of said court made and filed his findings of fact and conclusions of law therein and caused a decree to be entered in said action whereby it was adjudged and determined that your petitioner was the owner of the said compromise

ground, together with all the mineral therein contained, and the said The St. Louis Company was required, within thirty days from and after the entry of said decree, to execute and deliver to your petitioner a good and sufficient conveyance in fee simple absolute, free from all encumbrances, the form of which said conveyance was embraced in and made a part of such decree. A copy of the judgment-roll in said specific performance case is set out in the said record in cause No. 402, on pages 41 to 54, both inclusive, to which your petitioner prays reference as if the same was herein specifically set forth.

And your petitioner further shows and states that the said The St. Louis Company, first having made and lodged in the office of the clerk of the court a deed, in compliance with the requirements of said decree, took an appeal from said decree and judgment to the Supreme Court of the State of Montana, and thereafter, this cause having been heard upon such appeal, the judgment of the district court aforesaid was in all things affirmed, the said case being reported in 20th Montana Reports, at page 394; that thereafter the said The St. Louis Company sued out a writ of error from this honorable court to the Supreme Court of the State of Montana, and the said cause was brought to this court for review, and the judgment and decree therein was, on or about the 10th day of October, 1898, affirmed, and the said case was reported in 171 U. S., at page 650.

Amended and Supplemental Complaint.

5. And your petitioner further shows that thereafter and on or about the 26th day of June, 1899, the said The St. Louis Company filed its amended and supplemental complaint, in which it averred that it was the owner of the St. Louis Lode mining claim and was entitled to the rock and ore in all veins whose tops or apexes were within the surface lines of the said *fractional* portion of said St. Louis Lode mining claim, save and except the compromise ground and

the mineral therein contained, which it was averred was the property of your petitioner, as alleged in the amended complaint hereinbefore referred to, the only change being that the said amended and supplemental complaint contained an allegation that since the filing of the original complaint in the action and up to the 26th day of June, 1899, the said defendant, your petitioner, had extracted a large quantity of quartz rock and ore from the said premises, of the value of $50,000, for which recovery was prayed.

To this complaint your petitioner filed an answer, admitting the allegations in the first, second, and third subdivisions thereof and denying generally each and every other matter in said complaint contained; and in addition, and as a further defense, your petitioner pleaded the bond, the deed, and the judgment in the specific-performance case as a bar to recovery by the St. Louis Company of any damage for ores mined out of the compromise ground.

The St. Louis Company replied, expressly admitting the execution and delivery of the bond for a deed by its predecessors in interest, as in your petitioner's answer alleged, likewise admitted the bringing of the action in the specific-performance case and the decree and judgment entered therein, but alleged that the said deed and the said decree did not embrace any mineral found in said compromise ground except such as was in veins having their tops or apexes wholly within the surface boundaries of said compromise ground.

On the issues thus made the said cause came on for trial in the said circuit court before the Honorable Hiram Knowles and a jury on the 8th day of August, A. D. 1899. On the trial of said cause the Honorable Hiram Knowles held that where a top or apex of a vein entered and departed through the same side line of a claim the owners of such claim were entitled to follow the same on its dip beyond the side lines of their claim extended downward vertically, and held that the plaintiff, The St. Louis Company, was en-

titled to recover for all ores mined in said vein northerly from its so-called 108-foot plane, but that it was not entitled to recover for any ores mined south of its 108-foot plane and between that and its 133-foot plane, for that after passing the said 108-foot plane it had not the whole of the apex within the surface boundaries of its claims; that it would be taking the vein on its strike as well as its dip, and that it would be equivalent to taking a part of the surface of your petitioner's compromise ground. The said court likewise held that the bond, the deed, and the judgment in the specific-performance case hereinbefore mentioned were not sufficient to estop the said The St. Louis Company from claiming mineral found in the vein north of its said 108-foot plane. Thereupon the jury returned a verdict against your petitioner for the sum of $23,209. From this judgment your petitioner sued out a writ of error to the Court of Appeals for the Ninth Circuit, and thereupon, the said cause coming on to be heard on such writ of error, the said court of appeals sustained the rulings made by the circuit court and directed the entry of an order affirming such judgment, the opinion rendered in said cause appearing in 102 Fed. Rep., page 430, to which opinion your petitioner prays that reference may be had.

St. Louis Company's Writ of Error.

6. The said circuit court having held, as above set forth, that the said The St. Louis Company was not entitled to pursue the vein extralaterally at any point between its 108 and 133-foot planes, likewise sued out a writ of error to the said Circuit Court of Appeals, and the said cause coming on to be heard in the said Circuit Court of Appeals, the ruling and decision of said circuit court was reversed and it was erroneously held by the said Circuit Court of Appeals that because it was admitted that the St. Louis claim was an older location than the Nine Hour, therefore The St.

Louis Company was entitled to follow the vein on its dip so long as any portion of the apex remained inside the surface boundaries of its claims, ignoring the fact, plainly apparent from the record therein, that the said compromise ground had been patented as a part of the St. Louis claim, that it was only a small fraction of the area originally belonging to the Nine Hour and which had been wrongfully included in the St. Louis boundaries, and that it was impossible for one part of a mining claim to have priority in location or patent over another part of the same claim; and thereupon the said court of appeals reversed the judgment of the circuit court as to this part of the claim and directed the return of said cause to the circuit court aforesaid for trial as to the damage sustained between the two so-called planes, to wit, between the 108 and 133-foot planes. The opinion of said court of appeals is found in 104th Fed. Rep., page 664.

In the Supreme Court of the United States.

The court of appeals in and by its judgments aforesaid having held that a vein entering and departing through the same side line of a claim, as in the case at bar, could have extralateral rights; that where a wide vein crossed a line of a mining claim at an acute angle it could be followed on its dip and strike as long as any portion of the apex was within the surface boundaries of the mining claim which it had thus entered and passed out of; that a judgment and decree of a State court holding that your petitioner was entitled to all mineral within the compromise ground, without reference to where the top or apex of the vein might be in which such mineral was found, did not create an estoppel or confer any title to ores in veins having a part of their apex within the surface boundaries of the St. Louis claim, and having committed other errors not necessary to be enumerated, your petitioner sued out two writs of error, one to each of the judgments aforesaid, from this court to the said court of

appeals, and thereupon the case was removed into this court. Upon the hearing of said cause your honors found that on the hearing in the court of appeals upon the writ of error sued out by The St. Louis Company the judgment in the circuit court aforesaid had been reversed and set aside, and thereupon this court dismissed both writs of error, the opinion and judgment aforesaid being reported in 186 U. S., at page 24.

Court of Appeals Sets Aside Both Judgments.

8. Upon the mandate of this court in said cause being transmitted to the C[illegible]t of Appeals for the Ninth Circuit, the said court of [illegible] by a judgment duly made and entered on the 8th [illegible] October, 1902, ordered and directed that both judgment[illegible]ported respectively in 102d and 104th Fed. Rep., as above mentioned, be vacated and set aside, and that the judgment of the said Circuit Court for the District of Montana be and the same was thereby reversed and the cause remanded for a new trial; all of which will more fully appear by a reference to the remittitur of said court, a copy of which is in the said transcript of record in cause No. 402 on the docket of this court, at pages 17 to 19, both inclusive, to which your petitioner prays that reference may be had.

Second Trial.

9. Thereupon the said cause, upon the issues aforesaid, came on for retrial on said remittitur before the Honorable William H. Hunt, district judge of the district of Montana, and a jury, on or about the 31st day of May, A. D. 1905. Upon such retrial His Honor Judge Hunt held that while the two opinions above referred to in 102d and 104th Fed. Rep. might not be technically "the law of the case," yet he would give effect to the same precisely as if the judgments upon which said opinions rested had not been by the

said court of appeals reversed and set aside; and thereupon he held that your petitioner was concluded upon all questions, both of law and of fact, any reference to which was to be found in the said opinions or either of them, and refused to pass upon any question where any reference was made in such opinions to the matter in litigation. The said circuit court also erred otherwise in the trial of said cause, as is more fully set forth in the assignments of error contained in the record in No. 402, as aforesaid. The jury returned a verdict against your petitioner and in favor of The St. Louis Company for $195,000, and judgment was duly entered thereon in said circuit court on the 7th day of July, A. D. 1905.

The Case in the Court of Appeals.

10. Your petitioner thereupon sued out another writ of error from the Court of Appeals of the Ninth Circuit to the said circuit court and removed the case into the Circuit Court of Appeals for review, and thereupon, and the said cause coming on to be heard, the said court of appeals, on the 13th day of August, A. D. 1906, affirmed said judgment of the circuit court and rendered its opinion in said cause, holding that the two opinions theretofore rendered by it and appearing so as aforesaid in 102d and 104th Fed. Rep., were the law of the case, and that they were bound by such opinions on the second writ of error. A copy of the opinion of said Circuit Court of Appeals appears in the transcript of record in No. 402, as aforesaid, at page 144 thereof, to which your petitioner prays that reference may be made.

Right to Writ of Error.

11. Feeling aggrieved by such judgment, and that manifest error had occurred in the judgment so rendered in the circuit court and the affirmance thereof in the court of appeals, your petitioner sued out a writ of error from this

court to the said court of appeals for the purpose of obtaining a review of such judgment, and the said cause is now pending in this court on such writ of error and is numbered 402 in the docket of the court.

The case, as your petitioner believes, was originally commenced because of the federal questions which the said The St. Louis Company thought were involved in the case, and your petitioner, believing that it had no right to a writ of certiorari if a writ of error would lie, so sued out its writ of error as aforesaid; that when the said case was first here from the court of appeals on writ of error the jurisdiction of this court was attacked on the ground that there was no federal question so presented in the case as to give this court jurisdiction, and since the said case has been here on the present writ of error the jurisdiction of the court has again been attacked on substantially the same ground; that the said cause, on motion of your petitioner, has been advanced, and by the order of the court set down for hearing on the merits on the 10th day of December, 1906; that while your petitioner believes that federal questions determined by said circuit court and said Circuit Court of Appeals were in the case from the beginning, it may perhaps be doubted whether such federal questions are so clearly and distinctly set forth in the original complaint herein as to enable your honors to so determine; that the questions so to be determined as aforesaid are of vital importance, not only to the parties to said action, but to many persons engaged in the business of mining for the precious metals, and they are wholly undetermined by this court in any former decision rendered by it.

Your petitioner has spoken hitherto of only such questions of federal cognizance as appear upon the face of the complaint upon which the case was tried, and has urged upon your honors the importance of such questions, not only to the parties to this action, but also to the vast number of other persons engaged in mining for the precious metals

or interested therein; but there are many other questions of great importance appearing upon the record herein, but which do not appear upon the face of the amended and supplemental complaint. A few of these may be briefly enumerated as follows:

1. Is the right of extralateral pursuit of a vein having its apex within the surface boundaries of a mining claim conferred by section 2322, United States Revised Statutes, so far inalienable that it may not be conveyed by a conveyance of a part of such mining claim?

2. If this right may be severed and conveyed in the conveyance of a part of a mining claim, is any other form of conveyance necessary for that purpose than the ordinary common-law deed in use in the mining States and Territories?

3. Where the parties have agreed that all the extralateral rights of the grantor of a part of a mining claim shall pass by a deed, and insert therein, as a part of the descriptive clause thereof, the words "together with all of the mineral therein contained," are such words insufficient, under the section above referred to, for the purpose of conveying the extralateral rights of the grantor in the portion of the claim so conveyed, despite the fact that the parties to the deed have agreed that they shall have this effect?

It is scarcely thought necessary to comment upon the importance of an ultimate and final determination of these questions to the vast industry affected thereby. Daily, mining claims and parts of mining claims are sold, in many cases for fabulous sums, and if it be true, as determined by the court of appeals in the decision above referred to in 102 Fed. Rep., that—

> "To manifest such an intention, the terms of the contract and of the conveyance would, under the

> circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient,"

then this principle of law should be determined by this court finally and the question set at rest for all time. It is to the interest of the country at large that such a question as this should be set at rest, so that it may not give rise to future litigation. Already many cases have arisen depending upon this principle, and if there is nothing in the federal statutes, as your petitioner contends, upon which it can be based, that fact should be speedily determined.

4. Is the judgment of a State court having jurisdiction of the parties and of the subject-matter, to the effect that the grantor in a deed conveyed to the grantee therein every right, title, and interest which he had in the portion of a mining claim embraced in his conveyance, and that the said grantor and all persons claiming under him, should be forever barred from all interest or claim to the said premises, or to any portion thereof, or to the possession of the same or of any part thereof, of no force or effect under the terms of the Mineral Lands Act, in a federal court; and may the grantor, despite this, enter into and upon the premises so conveyed and so embraced in said decree and mine and take and carry away and convert to his own use the mineral contents thereof?

5. Under the Constitution and laws of the United States, what effect should be given in a federal court to a judgment rendered in a State court between the parties to the litigation in the federal court, and involving the same subject-matter, when the matter thus litigated involves rights in mining claims under the Mineral Lands Act?

There are other questions appearing upon the record and to be determined in said cause, arising directly and indirectly under the Mineral Lands Act, upon the correct solution of which the rights of the parties depend. These questions, one and all, are important not only to the parties here, but to all persons engaged or interested in the business of mining for the precious metals.

Your petitioner further shows that in response to a writ of error sued out in case numbered 402 of the October term, 1903, of this court, there has been lodged in the office of the clerk thereof a transcript of record from the Court of Appeals for the Ninth Circuit, which record has already been printed and to which your petitioner prays that reference may be made as if attached to its petition.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, therein entitled Montana Mining Company, Limited, plaintiff in erorr, *vs.* St. Louis Mining and Milling Company of Montana, defendant in error, and that the record in said cause numbered 402, now on file in the office of the clerk of this court, and printed, as aforesaid, be considered by this court as the return to such writ, to the end that the said case may be reviewed and determined by this court, as provided in section 6 of the act of Congress entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891; or that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act, and that the said judgment of the said Circuit Court

of Appeals in the said case, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray, etc.

MONTANA MINING COMPANY,
LIMITED,
By ALEXANDER BURRELL,
Its General Manager.

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
ALDIS B. BROWNE,
ALEXANDER BRITTON,
Counsel.

STATE OF NEW YORK, *County of New York, ss:*

ALEXANDER BURRELL, being first duly sworn, says: The above-named petitioner is a corporation, and I am an officer thereof, to wit, its general manager in the United States. I have read the foregoing petition and know the contents thereof, and the facts therein stated are true to my own knowledge, except as to such matters as are therein stated on my information and belief, and as to them I believe it to be true.

ALEXANDER BURRELL.

Subscribed and sworn to before me this 14th day of November, 1906.

[NOTARIAL SEAL.] JNO. C. McCUSKER,
Notary Public No. 27, New York County.

FILE COPY.

FILED.
NOV 28 1906
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PETITIONER,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
Attorneys for Petitioner.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23916

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

It is not believed that any very lengthy discussion of the questions involved in our petition for writ of certiorari in this case will be profitable.

We do not file this petition because we entertain any doubt about the proposition that the jurisdiction of the circuit court was originally invoked by reason of the federal questions involved; or that the amended and supplemental complaint, upon which the cause has been twice tried, does not clearly set forth two very important and wholly unsettled questions arising under the Mineral Lands Act, or because these federal questions and many others did not arise and were not adjudicated against us in both trials in the circuit court and in the circuit court of appeals. While these questions were really in the case from the beginning, they

are not alleged with that clearness and certainty in which they appear in the amended complaints. As to these complaints, the original and first amended, we may be permitted to say in passing that a copy of the original complaint appears attached to the reply brief filed by us to the respondent's motion to strike from the files of this court our petition for a writ of mandamus and restraining order to prevent the mining out of the property and its destruction *pendente lite;* but we have also suggested a diminution of the record to this court, and duly moved the court for a writ of certiorari to bring them into the record.

In *Ex parte Jones,* 164 U. S., 691, this honorable court says:

> "In this case the *original* bill averred the complainant to be a citizen of Pennsylvania."

And again, in the same case:

> "But even if another ground were developed in the course of the proceedings, the judgment of the court of appeals would be final if the jurisdiction of the circuit court were *originally* invoked solely upon the ground of citizenship."

Of course, our petition clearly shows that the jurisdiction of the circuit court was not and could not have been invoked on the ground of diverse citizenship.

Like expressions occur in—

Filhiol v. Maurice, 185 U. S., 108.
Gold-Washing & Water Co. v. Keyes, 96 U. S., 199.
Starin v. N. Y., 115 U. S., 248,
and other cases.

Fearing that this honorable court might feel itself bound by what is or is not well pleaded in the original complaint, we have filed this petition out of abundant caution.

Under the statutes of the State of Montana, when an amended pleading is filed it takes the place of and supplants

the pleading so amended; and this is the law everywhere, we believe. This is the reason why the original and first amended complaints are not found in the record in this case and have to be supplied, as already stated. The case having been tried on the second amended and supplemental complaint, that complaint supersedes, takes the place of, and relates back to the original and first amended complaints. For the purpose of ascertaining upon what ground jurisdiction was originally invoked, or whether there was or was not a federal question stated in the pleading sufficient to confer jurisdiction upon the circuit court, this court may hold this last-mentioned complaint is sufficient.

We have ventured to file this petition upon the authority of *Whitney, Warden, etc., v. Dick*, 202 U. S., 132. In that case the Solicitor General had appealed to this court from a decision rendered by the Court of Appeals of the Ninth Circuit, and while the appeal was pending he filed a petition for a writ of certiorari, and in such petition, after setting up the character of the case and the decisions rendered by the lower courts, and particularly that of the court of appeals, he alleged:

> "From that judgment an appeal was allowed to this court. The record in that case, which has been printed, is referred to in this petition. This application for certiorari is made because it is thought an appeal will not lie, there being no pecuniary amount involved."

The case of *Pullman Palace Car Co. v. Cent. Transp. Co.*, 171 U. S., 138, came to this court for review in the same way. The case was appealed direct to this court by the Pullman Company from a judgment adverse to it in the Circuit Court of the Eastern District of Pennsylvania, February 1, 1896, the appeal being allowed by Mr. Justice Shiras. This appeal was so taken on the assumption that it was a case falling under the provisions of section 5 of the act of March 3, 1891.

Thereafter, counsel being in doubt, on the 29th day of

April, 1896, sued out an appeal to the Court of Appeals of the Third Circuit. Afterwards and on December 2, 1896, the appellee filed a motion to dismiss for want of jurisdiction. This motion not having been previously disposed of, the appellant, on October 29, 1897, filed its petition for certiorari, which was granted. This court, through Mr. Justice Peckham, after reciting the various appeals, says:

> "Whichever route may be the correct one, either directly from the circuit court or through the circuit court of appeals, it is unnecessary to decide, because the case is now properly before us either by appeal or by writ of certiorari, and we therefore proceed to determine it upon the merits."

In times past it has not been unusual to find cases brought from the supreme court of a State or Territory, by both writ of error and appeal, where a reasonable doubt might be entertained as to which was the proper method of removing the case into this honorable court. We can conceive of no objection to this practice, and think it is justified by the cases just cited.

The Class of Cases in Which Certiorari Will be Granted.

We understand that the rule which will govern your honors in determining whether a given cause should or should not be removed into this court for review by certiorari was stated clearly in—

Lau Ow Bew *v.* U. S., 141 U. S., 583.

In that case it was said:

> "It is evident that it is solely questions of gravity and importance that the circuit court of appeals should certify to us for instruction: and that it is only when such questions are involved that the power of this court to require a case in which the judgment

In *Security Trust Co. vs. Dent*, 187 U. S., 237, 239, the court held:

> "We think the proper course was to have asked for a writ of certiorari to bring the final judgment of the circuit court of appeals here for review. However, under the powers possessed by us under the judiciary act of March 3, 1891, we now allow a writ of certiorari, and direct that the copy of the record heretofore filed under the writ of error shall be taken and deemed as a sufficient return to the certiorari."

and decree of the court of appeals is made final, to be certified, can be properly invoked."

The gravity and importance of this case to the parties is apparent from the enormous verdict and judgment against your petitioner and in favor of the respondent standing upon the records of the Circuit Court for the District of Montana. The importance to the parties of the determination of the federal question as to whether a party who has a portion of the apex of a claim within his surface boundaries, and which crosses out of said surface boundaries, may follow it beyond the point where he has the whole of such apex within his surface boundaries, is shown by the fact clearly set forth in the petition, that upon the first trial of this case the verdict and judgment against your petitioner was $23,209.00.

On this trial, it will be remembered, that the respondent was only allowed to recover for such ores as had been mined out of the vein north of its 108-foot plane, while on the second trial, the record of which is numbered 402, of the October term, 1906, of this court, the recovery was for all lying north of its 133-foot plane, or the point where the foot wall of the vein crossed the western boundary line of the compromise ground, a difference of practically $172,000, and the effect of the judgment in determining the ownership of the entire vein in dispute includes additional ore of great value.

But it is evident that the questions involved in this case are not only of gravity and importance to the parties, but they are likewise questions of importance to a great many people engaged or interested in the business of mining for the precious metals. The court will take judicial notice of the fact that this industry is a large and exceedingly meritorious one; that its product is the measure of value for every other occupation and pursuit of man, and that the rights of the parties engaged in this hazardous business ought to be definitely settled, determined, and set at rest.

As to this question, namely, when a vein having a wide apex is found crossing a side line of a claim at an acute angle, where shall the line be drawn down parallel to the end lines of the claim, and which shall mark the extent of the miner's right to pursue the vein extralaterally? Shall it be at the point where he has the whole of the apex within his surface boundaries, or shall it be at a point where the apex wholly leaves his surface boundary and he has none of it within his ground?

By a reference to this case, reported in 104 Fed. Rep., p. 664, it will be seen that Judge Hiram Knowles, before whom the case was first tried, held that the first named point was the proper place to draw down this plane, while Judge Morrow, of the court of appeals, held that the latter was the proper point. Aside from these two decisions, we have not been able to find any reported case bearing upon this question.

Can a Vein Which Enters and Departs through the Same Side Line of a Claim Have Extralateral Rights under Conditions Similar to Those Found in This Case?

This is likewise a question of gravity and importance, not alone to the parties to the action, but to every one engaged in the business of mining. Up to the present time, we know of but one decision on this question, namely,

Catron v. Old, 23 Colo., 483; 48 Pac., 687.

With reference to this, Mr. Lindley in his excellent work on Mines, first edition, disposes of the whole question in a single sentence; he says: "It seems hardly necessary to discuss the question of extralateral rights as applied to a case where a vein enters and departs through the same side line" (2 *Lindley on Mines,* sec. 584). We think he is right. Under the provisions of the Mineral Lands Act it would

seem clear that one line of a claim could not serve for both end lines.

The end lines of a claim must be parallel with each other, and, geometrically speaking, no line can be parallel with itself. The location of the claim is to be along the vein, and the end lines of the claim are those which are crossed by the apex of the vein, or towards which it runs in its course through the claim and would cross if continued in its own direction. In order to entitle a locator to pursue his vein on its dip in its downward course beyond his side line, the two lines which the lead crosses on its strike must be parallel. Parallel end lines are essential to the existence of extralateral rights.

Iron Silver Mining Co. v. Elgin Mining Co., 118 U. S., 196.

Montana Mining Co. v. Clark, 42 Fed., 628.

Tyler Mining Co. v. Sweeney, 54 Fed., 284.

No question arising under the federal mining laws can be said to be better settled than this.

How May Extralateral Rights be Conveyed?

At page 11 of the record of this case appears a deed made by the respondent to your petitioner. It conveys to your petitioner the compromise ground described by metes and bounds, and included in the descriptive portion of the deed are the words "together with all the mineral therein contained." By a reference to the offered testimony of Robinson, Decamp, Sterling, Eddy, and Toole (Record, pp. 59-64), it will be seen that these words were inserted in the original bond and in the deed by reason of the fact that the parties thereto had expressly agreed that the west boundary line of the compromise ground should be vertical; that the St. Louis Company should own everything west of that line, and that the Nine Hour owners should have everything lying

to the east thereof; that the words "together with all the mineral therein contained" were inserted for the purpose of cutting off all extralateral right of the part of the ground in dispute which lay to the west of that line; that before Robinson would accept the bond he went to Mr. Toole (who was the counsel for his opponent, Mayger), who had drawn it, with two questions, and his acceptance or rejection of the bond and the compromise it was to carry into execution was dependent upon the answers to those questions.

The first question was, whether Mr. Mayger could pay the penal sum named in the bond and refuse to make conveyance of the premises described, and, second, whether the words referred to were sufficient to cut off extralateral rights in the portion of the disputed premises he was accepting by way of compromise.

By adhering to the opinion reported in 102 Fed. Rep., p. 430, the court of appeals has held that no force or effect whatever should be given to these words, saying:

> "It is not to be supposed that the owners of the St. Louis claim intended by the compromise contract not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights—rights that had not been in litigation and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, 'together with dips, spurs, angles, and also all the metals, ores, etc., therein.' "

Upon the last trial of this case we were in court with witnesses offering to prove that these words meant exactly what we have claimed for them; that they were put there for the

express purpose of shutting off all extralateral right, and that whatever the owners of the St. Louis claim "intended," they agreed that this should be their effect; and yet, despite this, the circuit court of appeals holds that those words are absolutely meaningless; that they neither add to nor take away from anything else found in the deed. In thus holding we submit that the court of appeals puts itself at variance with several decisions rendered by this court to the effect that where there may be any ambiguity in the language used in an instrument of this kind, the court should inquire into the surrounding circumstances and avail themselves of all the light which may be shed upon the question thereby.

> "They are accordingly entitled to place themselves in the same situation as the parties who made the contract, in order that they may view the circumstances as those parties viewed them, and so judge of the meaning of the words and the correct application of the language to the thing described."
>
> *Nash v. Towne*, 5 Wallace, 699.

> "To ascertain the intent of the parties is the fundamental rule in the construction of agreements. * * * The state of things and the surrounding circumstances in which an agreement is made will be looked at as a means of throwing light upon its meaning, especially for the purpose of ascertaining what is its true subject-matter."
>
> *Canal Co. v. Hill*, 15 Wallace, 94.

> "In construing contracts a court may look not only to their terms, but to their subject-matter and surrounding circumstances, and avail itself of the same light which at the time of making them the parties possessed."
>
> *Merriam v. U. S.*, 107 U. S., 437.

It is respectfully suggested that no further citation of authority is needed to show that the holding in this respect of the honorable court of appeals was at variance with well-

considered decisions of this court and was radically wrong as well.

These well-established principles of law for which we contend have been crystallized into a statute in the State of Montana by the following sections of the Civil Code of that State:

> "SEC. 2201. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."
>
> "SEC. 2203. The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity."
>
> "SEC. 2212. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates."

Of course, it is to be remembered, in criticising the opinion of the court of appeals (Record, page 144) that it felt itself bound by its former opinions, and applied to the decisions the doctrine of "the law of the case" in its strongest sense, although it involved the absurdity of making it contradict itself. On the first trial of this cause we relied upon the judgment rendered in the specific-performance case. We thought that absolutely conclusive as between the parties, and therefore no proof of the agreements and understandings of the parties leading up to the execution of the bond for a deed were offered in evidence; and with the record in this condition, the court of appeals said:

> "In interpreting the conveyance in question, regard must be had not only to the terms, but the subject-matter involved, and the surrounding circumstances, in order to ascertain the intention of the parties."

And again:

> "All these antecedent circumstances leading up to and culminating in the deed, are properly considered

in determining what was the intent of the parties to the contract" (102 Fed., 430, 432, 433).

The words "together with all the mineral therein contained" were inserted in the bond for a deed by the parties for a purpose; they attached some significance to these words, and the court should not have said that they had no significance, but should have undertaken to ascertain the circumstances under which they got into the instrument. If what was said by the parties with reference to their effect, and if, after inquiry, the intention of the parties with reference to the signification of the words to them at the time the instrument was made could be ascertained, then the same significance with which the parties understood them at the time of the making of the instrument should be given to them.

We respectfully suggest that the language used falls under section 2203 of the Civil Code, above quoted, and that it is clear and explicit and does not involve an absurdity, and should be held to mean exactly what it says, that the respondent, The St. Louis Company, conveyed a piece of ground to the petitioner, by metes and bounds, including an area of about 12,844.5 feet, "together with ALL the mineral therein contained." All does not mean a portion; it does not and cannot be made to mean all mineral found in leads, lodes, or ledges having the whole of their apex within the surface boundaries of the compromise ground as described, and excepting therefrom such mineral as may be found within the ground in leads, lodes, or ledges having their apexes beyond the western side line of said ground. The words "together with," in connection with a previously mentioned subject in a deed or power, operate to enlarge, and not to restrain, that which was previously granted.

Winter v. Loveden, 1 Lord Raymond, 267.

Cardigan v. Armitage, 2 Barn. & Cres., 197.

The words "together with" are equivalent to the word "also," which means "likewise," "in like manner," "in addition to," and denotes that something is added to something which precedes it.

Panton vs. Tefft, 22 Ill., 366.

Scratch this case almost anywhere and you disclose a federal question. What federal question have we here? The court of appeals says in its opinion (102 Fed., 430):

> "To manifest such an intention (*i. e.*, to convey extralateral rights granted under the provisions of sec. 2223 of the Revised Statutes of the United States) the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words 'together with all minerals therein contained' is not sufficient."

The intention to convey extralateral rights, therefore, must be in apt and appropriate language. What that language is the court does not say, but it does say that the expression used by these parties, and which they meant and intended and expressly agreed should convey extralateral rights, was not sufficient. We respectfully submit that this is a question which can be answered only by a proper construction of a statute of the United States, and that here our rights turn upon that construction. If the statutes had been construed so as to make the words used by the parties sufficient for the purpose of conveying extralateral rights, then the decision would have been in our favor; but, as these words were held not to be sufficient, the decision of the court of appeals is against us. What more is necessary to make a federal question, except that this question should appear on the face of some pleading on the part of the plaintiff? This is not claimed; but we do claim that in this, like nearly every other question in the case at bar, resort must be had to the Mineral Lands Act for its answer. And, with all due respect for the court of appeals, we say that its solution of the question and

its interpretation of section 2223 of the Revised Statutes is absolutely wrong. Strike the words "together with all the minerals therein contained" out of the deed, and what have you? You have a conveyance made upon a sufficient consideration, valid and unimpeachable in all respects as between the parties, and by its express terms you have a part of a mining claim conveyed by metes and bounds, "together "with all dips, spurs and angles, and also all the metals, "ores, gold and silver bearing quartz rock and earth therein, "and all the rights, privileges and franchises thereto inci-"dent, appendant or appurtenant, or therewith usually had "and enjoyed, and also all and singular the tenements, "hereditaments and appurtenances thereto belonging or in "anywise appertaining, and the rents, issues and profits "thereof. AND ALSO ALL AND EVERY RIGHT, TITLE, INTER-"EST, PROPERTY, POSSESSION, CLAIM AND DEMAND WHATSO-"EVER AS WELL IN LAW AS IN EQUITY OF THE SAID PARTY "OF THE FIRST PART, OF, IN OR TO THE SAID PREMISES AND "EVERY PART AND PARCEL THEREOF, WITH THE APPUR-"TENANCES."

The right of extralateral pursuit of a vein having its top or apex within the boundary lines of the St. Louis claim was a right in the grantor at the date of the execution of this conveyance. Can anbody give a valid reason why this right did not pass to its grantee on the execution of this deed? It is to be observed that there is no *reddendum* clause anywhere within the four corners of this instrument. Absolutely nothing is reserved or excepted anywhere in it. Is there anywhere a case, aside from this one, of course, where it has been held that such an instrument did not absolutely pass every right, title, and interest which the grantor had in the property conveyed, at the date of the conveyance? In this respect, this decision is certainly unique.

In *Jones et al. v. American Ass'n*, 86 S. W., 1111, the Court of Appeals of Kentucky had occasion to construe a deed containing the following language, which was, how-

ever, in the habendum, and not in the descriptive or granting clause:

> "together with the coal banks reserved by said George to himself in the deed made to J. B. George."

and another deed in the same case in which, in the habendum clause, were found the following words:

> "with the exception of all the coal banks."

The court said:

> "The rule is that a deed is construed as any other instrument to effectuate the intention of the maker, and reservations or exceptions are enforced, although contained in the habendum clause of the deed, as fully as if set out in the granting clause, when on the whole instrument the intention of the parties is sufficiently expressed to be enforced. Although the reservation in the deed from Robert George to James D. George is inserted in the habendum clause, it is so fully and clearly expressed as to leave no doubt of the intention of the parties that the grantor reserved all the coal banks on the lands, and held the right to them and the privilege of a way to the different coal banks with a wagon and team. It is insisted for appellees that the words 'coal banks' must refer to a mine that has been opened, but it is agreed in the record, as a fact which we know to be true, that when the deeds were made the county was sparsely settled, there were no railroads, and no mercantile developments of coal mines. In view of the entire language of the deed, and the circumstances under which it was made, when the grantor reserved all the coal banks, he referred to the veins of coal in the ground and not merely to such as had been opened. There had been little or no development of coal lands at that time, and the purpose of the grantor was to reserve the coal under the land.
>
> "It is earnestly insisted that in the deed from Robert George to Bruce there is a conveyance of only the four tracts of land, and that all that is said about the

> coal in that deed occurs in the habendum clause. The rule is relied on that the habendum clause will never extend the granting clause so as to make the deed cover property not included in the granting clause. But the rule referred to is not recognized by the more modern authorities, and is not enforced in this State. The modern rule is to read a deed as any other instrument."

The doctrine of extralateral rights is clearly in contravention of the common law.

> "The general rule of the common law was that whoever had the fee of the soil owned all below the surface."
>
> *Del Monte M. Co. v. Last Chance M. Co.*, 171 U. S., 55-60.

There is nothing in the federal statutes giving the right of lateral pursuit any of the qualities of a covenant running with the land or making it inalienable, except in express terms. We say, therefore, that unless this right is preserved by fit and appropriate words of exception or reservation in the grant, everything contained in the ground conveyed passes by the deed. The Government of the United States occupies no different plane when it comes to dealing with its real estate than does any other owner of that species of property. When it makes a conveyance—*i. e.*, a patent of a mining claim—it does two things with reference to extralateral rights: First, it conveys to its grantee the right to pursue the vein found within the surface boundaries of the claim in its downward course, though it passes under the vertical side lines of his claim and into the premises adjoining; and, secondly, in express language it excepts from the grant made and reserves to an adjoining owner the right of extralateral pursuit. If the reservation is necessary in a patent in order to give an adjoining owner this right, or if unnecessary in a patent, it is only so because the reservation has already

been made by statute, then it is equally necessary in a deed from an individual, and a grantor not reserving it would be thereafter estopped by his deed from asserting it against his grantor. It passes like everything else, whether rock, stone, or mineral, by its conveyance.

> "The effect of the deed from Gillis to plaintiff was to estop him and those claiming under him from questioning the title of the plaintiff to all the gold that might be found in the West vein, within the surface line of his deed. The gold in controversy was found within the surface lines of this deed, and it was also found within the limits of the two walls forming the West vein, although the place at which it was found is also within the lines of the walls which form the Rice vein. This latter circumstance does not, however, relieve Gillis from the estoppel of his deed, for, as the *deed contains no reservations*, and as there was no evidence at the trial of any mining customs, effect must be given to the deed according to its terms by holding that the entire West vein within the surface lines, even though intersected by another, passed to the plaintiff."
>
> *Stinchfield v. Gillis*, 107 Cal., 86; 40 Pac. Rep., 98.

The facts in this case are found in the opinion of the court on a former appeal, 96 Cal., 400; 30 Pac., 839. On and prior to January 17, 1886, Gillis was the owner of the "Carington" claim. On that day he sold to Stinchfield a portion of his claim known as the Pine Tree mine, conveying the same to him by a simple bargain-and-sale deed. At this time one Rice was working on a portion of the Carington claim not included in the sale to Stinchfield, which was known as the Rice vein. The apices of the two veins, called respectively the "West" vein and the "Pine Tree" vein, were within the surface boundaries of the "Pine Tree" claim, while the apex of the Rice vein was on that portion of the claim not sold to Stinchfield. Immediately after the sale to

Stinchfield, Gillis made a new location on the part not sold, and a few days afterwards Stinchfield also made a new location on the part of the claim he had purchased from Gillis. In other words, both parties abandoned the "Carington" location, and each for himself made a new location of his part of the claim, Gillis being the elder. Rice, who was working for Gillis, followed his vein down to where it intersected the "West" vein, under the surface conveyed to Stinchfield, and removed ore at the point of intersection of the two veins of the value of about $10,000. Stinchfield brought suit against Rice and Gillis to recover for this trespass, and, notwithstanding his was the junior location, recovered judgment.

Under the provisions of sec. 2336, U. S. Revised Statutes, providing that all ore in the space of intersection of two veins shall belong to the prior locator, Gillis would have been entitled to the ore but for the estoppel created by his deed. Is this right of extralateral pursuit greater in any respect than the right to the ore at the point of intersection of two veins; and if it is not, and one may be lost in this way, why not the other as well?

> "Unquestionably, in mineral land there may be a severance of estates; the mineral constituting a separate corporeal hereditament, capable of distinct conveyance from the surface or the soil, each estate being in separate owners. But it is also true that, until there has been a severance, ownership of the surface carries with it ownership of the minerals beneath the surface. As expressed in 1 *Lindley on Mines*, at section 2, under the common law minerals were the property of the owner of the land, the property on the surface carrying with it the ownership of everything beneath and above it; and this *prima facie* ownership continued until rebutted by showing that ownership of the mines and minerals had become in fact several and distinct from the ownership of the soil or surface. (See also *Barringer & Adams on the Law of Mines*, p. 4.) In 2 *Washburn on Real Property* (6th ed.),

sec. 1318, the learned author says: 'Whoever owns the surface is presumed to own and would originally actually own whatever minerals there might be beneath the surface, until he shall have granted away the one or the other, and thus separated their ownership.' "

Bogart et al. v. Amanda M. Co., 74 Pac. Rep., 882.

In *Central Eureka M. Co. v. East Central Eureka M. Co.* (Cal.), 79 Pac. Rep., 834, we find the following language:

> "Defendants, relying upon the well recognized principle that a conveyance of land, IN THE ABSENCE OF EXPRESS RESERVATION, carries not only the surface of the earth, but everything under it, and over it, *including the minerals therein contained*, claim that the effect of this deed was to convey to the defendants the portion of the vein here in dispute. As the plaintiff was at the date of the deed the owner of such portion of said vein, such must be held to be the effect of the quit-claim deed *if the description in the deed includes the same.*"

A very important part of this opinion, so far as the proposition we are discussing is concerned, is the following:

> "A very different case would be presented, if we were dealing with a deed which contained a description of a parcel of land simply by *metes and bounds*, or a deed which purported to *convey all lands* lying east of a certain defined surface line. We have no such deed here, but one which in terms limits its operation to such portions of the designated sections as lie east of the mining ground of plaintiff. Taking into consideration simply the character of the plaintiff's property, we are of the opinion that the deed does not purport to convey any portion of any vein that had its apex within the surface lines of the plaintiff's location so far as it lay between the converging end lines of plaintiff's claim."

We respectfully submit that this case falls exactly within the rule announced in *Lau Ow Bew v. U. S., ut supra*, and that any doubt as to the jurisdiction of this court to hear and determine the issues ought to be set at rest. As said by Judge Ross in his dissenting opinion, 104 Fed., "The importance of the question, not only to the correct determination of the present case, but in respect to other pending claims, is too manifest to require comment."

Respectfully submitted,

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W. E. CULLEN,
Attorneys for Petitioner.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

quartz lode mining claim known as the St. Louis Quartz Lode mining claim, and of the quartz, rock, and ore and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said fractional portion of said St. Louis Lode mining claim, although such veins, lodes, or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side lines of the surface of the said St. Louis Quartz Lode mining claim, which is situated in Ottawa mining district, in the County of Lewis and Clark and State of Montana, and more particularly described as follows, to-wit:

"Beginning for the description of lots No. 54 and 55A at corner No. 1, a granite stone 16 x 12 x 12 inches, marked 1 M. C. 54, a mound of stones alongside, from which the quarter section corner on south boundary of section 36, in township 12 north of range 6 west of the principal meridian bears south 74 degrees and 15 minutes east 353 feet distant.

"Thence, first course, magnetic variation nineteen degrees east, south 21 degrees and 15 minutes west, one hundred and two feet, intersect line between townships 11 and 12 north, of range 6 west, a granite stone 15 x 14 x 12 inches, marked 54 M. C. 55A, four hundred and fifty feet to a point from which a shaft bears north sixty-seven degrees west two hundred and eighty-five feet distant, and from said shaft an open cut 3 x 5 feet, one hundred feet long, runs south 54 degrees east; six hundred and fifty-five feet to a point, from which a shaft bears west one hundred and fifty-three feet distant, ten hundred and ninety-seven feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked 2 M. C. 55A, a mound of stones alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west two hundred and eighty-nine feet distant.

"Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, four hundred and three feet to corner No. 3, a slate stone 14 x 10 x 4 inches, marked 3 M. C. 55A, a mound of stones alongside, from which the southeast location corner bears south 10 degrees east four hundred and thirty-five feet distant.

"Thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, six hundred feet to corner No. 4, a granite stone 20 x 8 x 7 inches, marked 4 M. C. 55A, a mound of stones alongside, from which the southwest location corner bears south 79 degrees west one hundred and eighty-two feet distant.

"Thence, fourth course, magnetic variation 19 degrees east, north fifty-one degrees 15 minutes east four hundred and twenty-five feet to corner No. 5, a granite stone 16 x12 x 6 inches, marked 5 M. C. 55A, a mound of stones alongside.

"Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees, 45 minutes east, five hundred and twenty-nine and seven-tenths feet distant, intersects said township line, a granite stone 18 x 14 x 7 inches, marked 54A, 54 M. C., ten hundred and sixty-nine feet to corner No. 6, a granite stone 18 x 12 x 6 inches, marked 6 M. C. 54A, from which a fir tree 13 inches in diameter marked 6 M. C. 54 B. T. bears north 15 degrees east twenty-four feet distant, and a pine tree five inches in diameter marked 6 M. C. 54 B. T. south fifty-four degrees east, twenty-one and five-tenths feet distant.

"Thence, sixth course, magnetic variation nineteen degrees east, south forty-five degrees thirty minutes east five hundred and fifteen and five-tenths feet to corner No. 1 of lot No. 40, the Drumlummon Lode claim, five hundred seventy-nine feet to corner No. 1, the place of beginning, said lot Nos. 54 and 55A extending fifteen hundred feet in length along said St. Louis vein or lode—the granted premises in said lot containing eighteen acres and ninety-three hundredths of an acre."

Save and except that portion thereof known as the thirty-foot strip or compromise ground, which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis Lode mining claim is described as follows, to-wit:

Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears south thirty-nine degrees thirty-two minutes east, said course being at right

angles to the boundary line of the St. Louis lode between corners 2 and 3 fifty feet distant; thence north fifty degrees twenty-eight minutes east on a line parallel to the aforesaid boundary line of the St. Louis lode between corners 2 and 3 thereof, two hundred and twenty-six feet to a point on the boundary line of the St. Louis lode between corners 1 and 2; thence south twenty degrees twenty-eight minutes west along said boundary between corners 1 and 2 sixty and five-tenths feet to corner No. 2 of the St. Louis lode; thence south fifty-one degrees thirty minutes west four hundred and three feet to corner No. 3 of said St. Louis lode; thence north forty-five degrees thirty minutes west along the line of boundary of the said St. Louis lode between corner 3 and 4 thirty feet to a point; thence north fifty degrees twenty-eight minutes east along a line parallel to the boundary line of the St. Louis lode, between corners 2 and 3, two hundred and thirty feet to the point of beginning, including an area of about 12,844.50 square feet, together with all mineral contained therein.

III.

That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour Quartz Lode mining claim, situate and being east of the said St. Louis Lode mining claim and including the thirty-foot strip or compromise ground aforesaid, and that the discovery, location, and recordation of the said St. Louis Lode mining claim and the United States patent therefor was made prior to the discovery, location, and recordation and patent of the said Nine Hour Lode mining claim.

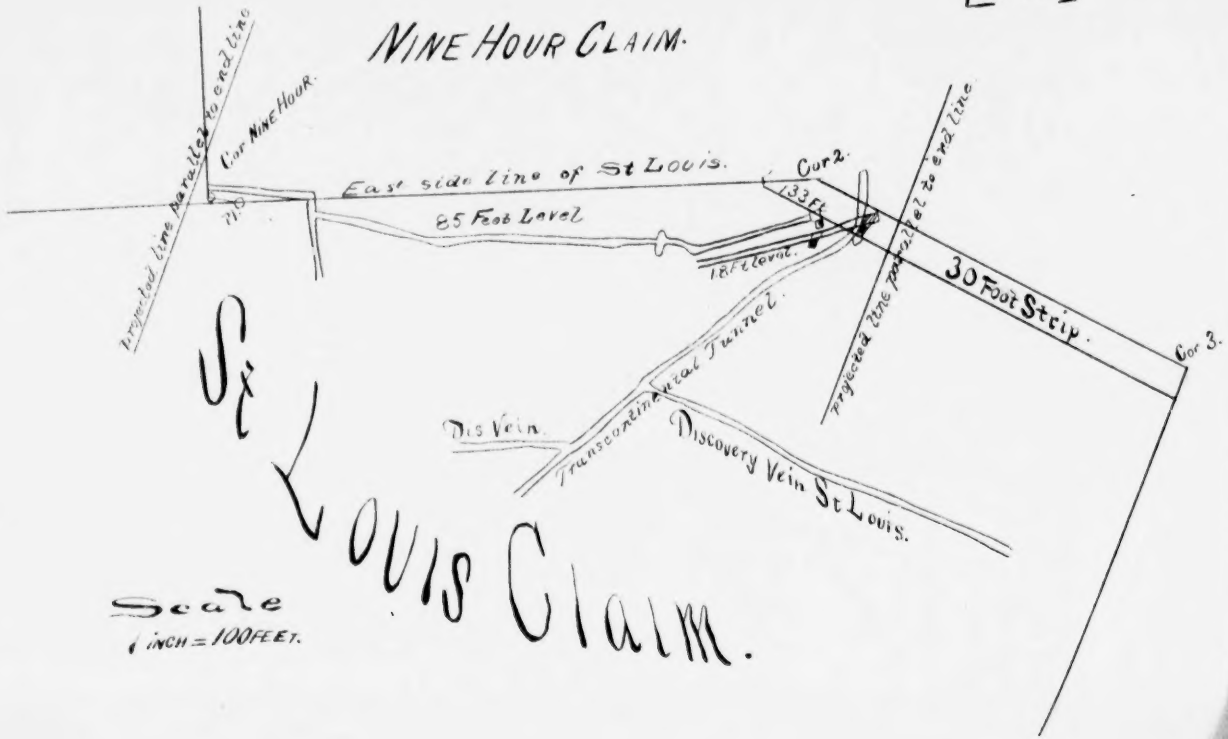
IV.

That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented

ground of the said St. Louis Lode mining claim is to the east and dips under and beneath the said Nine Hour Lode mining claim, including the said thirty-foot strip, or the compromise ground, which is a part and portion of the said Nine Hour Quartz Lode mining claim, which said portion of said vein has its top or apex within the said St. Louis Lode mining claim as follows, to wit: Commencing at a projected parallel end line of said St. Louis Quartz Lode mining claim, at a point on the east side line thereof between corners Nos. 1 and 2, extended vertically downward, whereat it passes through the hanging wall of said vein, lode, or ledge, at a point from which corner No. 1, being the northeast corner of said St. Louis Quartz Lode mining claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise at said projected parallel end line five feet west of the east side line of said St. Louis Quartz Lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west 512.7 feet to a point, being the intersection of the said east side line of said St. Louis Quartz Lode mining claim between corners 1 and 2, with the west line of the said thirty-foot strip hereinbefore described; thence south 50 degrees 50 minutes west 108 feet and along the west line of the said thirty-foot strip to a projected parallel end line of said St. Louis Quartz Lode mining claim, extended vertically downward, which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said thirty-foot strip.

A map or plat showing the point at which the said vein enters said St. Louis Lode mining claim, so as hereinbefore described, and whereat the same departs therefrom upon the east end line of said claim, is hereto attached, marked

[No 402]


NINE HOUR CLAIM.
Projected line parallel to end line
Cor Nine Hour.
East side line of St Louis.
Cor 2.
133 Ft.
85 Foot Level
100 Ft Level.
Projected line parallel to end line
30 Foot Strip.
Cor 3.
Dis Vein.
Transcontinental Tunnel.
Discovery Vein St Louis.
St Louis Claim.
Scale
1 INCH = 100 FEET.

"Exhibit A," and made a part of this complaint, and to which reference is made.

That it is also the owner of, in possession, and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned a distance of 25 feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis Lode mining claim.

V.

That, notwithstanding the right of the said plaintiff in the premises, the said defendant, on or about the thirtieth day of June, 1893, knowingly, wrongfully, and unlawfully, by means of drifts, shafts, tunnels, and underground workings, entered into and upon that portion of the vein, lode, or lead so apexing within the said St. Louis mining claim and commenced extracting quartz, rock, and ore therefrom and removing the same and converting it to its own use and benefit, and are now still removing and converting the same, which said quartz, rock, and ore is of the value of two hundred thousand dollars; on account whereof this plaintiff has been damaged in said sum.

Wherefore plaintiff prays judgment for the said sum of two hundred thousand dollars, together with its costs and disbursements in this behalf expended.

E. W. Toole and
Thos. C. Bach,
Attorneys for Plaintiff.

United States of America,
State of Montana, County of Lewis and Clark, ss:

On this twenty-first day of November, A. D. 1898, personally appeared before me, Harry Harris, a notary public in and for said county and State, William Mayger, general manager and superintendent of the St. Louis Mining and

Milling Company of Montana, the plaintiff corporation above named, who, being by me duly sworn, deposes and says that he is the general manager and superintendent of said company and familiar with its business; that he has read the foregoing bill of complaint and knows the contents thereof, and that the said is true to the best of his knowledge, information, and belief.

WILLIAM MAYGER.

Subscribed and sworn to before me this twenty-first day of November, A. D. 1898.

[NOTARIAL SEAL.] HARRY HARRIS,
Notary Public in and for Lewis and Clark County, State of Montana.

(Endorsed:) No. 291. In the Circuit Court of the United States, Ninth Circuit, District of Montana. St. Louis Mining and Milling Company of Montana, plaintiff, *vs.* Montana Mining Company, Limited, defendant. Complaint. Filed Nov. 21, 1898. Geo. W. Sproule, Clerk. Service of copy admitted this 21st day of Nov., '98; Cullen, Day & Cullen, att'ys for def't. E. W. Toole and Thos. C. Bach, att'ys for def't.

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify that the foregoing is a full, true, correct, and compared copy of the first amended complaint in case No. 291, St. Louis Mining and Milling Company of Montana, plaintiff, *vs.* Montana Mining Company, Limited, defendant, on file and of record in my office as such clerk.

Witness my hand and the seal of said circuit court, at Helena, Montana, this 26th day of October, A. D. 1906.

GEO. W. SPROULE, *Clerk,*

[SEAL.] By C. R. GARLOW,
Deputy Clerk.

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true and correct copy of "Certified copy of first amended complaint, filed at request of Mr. W. E. Cullen Nov. 13, 1906," in the cause entitled Montana Mining Company, Limited, plaintiff in error, *vs.* St. Louis Mining and Milling Company of Montana, defendant in error, No. 1240 in said Circuit Court of Appeals, as the original thereof remains on file in my office.

Attest my hand and seal of said Circuit Court of Appeals, at San Francisco, California, this 23rd day of November, A. D. 1906.

[Seal United States Circuit Court of Appeals,
Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

FILE COPY.

Office Supreme Court, U. S.
FILED.
NOV 30 1906
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

CERTIFIED COPIES OF ORIGINAL AND FIRST AMENDED COMPLAINT.

W. E. CULLEN,
CHARLES J. HUGHES, JR.,
A. B. BROWNE,
Counsel for Plaintiff in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24098

(20,367.)

In the Circuit Court of the United States,

NINTH CIRCUIT, DISTRICT OF MONTANA.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, PLAINTIFF,

versus

MONTANA MINING COMPANY (LIMITED), RAWLINSON T. BAYLISS, ALEXANDER BURRELL, ISAAC WARREN, JOSEPH HARVEY, NICHOLAS FRANCIS, JOHN JEWELL, AND THOMAS HOWKINS, DEFENDANTS.

COMPLAINT.

The plaintiff in the above-entitled action complains of the defendants therein and for cause shows unto this honorable court:

I.

That at the dates hereinafter mentioned the plaintiff was, and now is, a corporation duly organized and existing under the laws of the State of Montana, and as such authorized and entitled to hold, have, possess, use, and enjoy mining property in said State, with all the rights, privileges, and immunities incident and appurtenant thereto and usually had, held, and enjoyed in connection therewith; and that at all of said dates the said defendant, Montana Mining Company (Limited) was, and yet is, a corporation duly incorporated

and organized under the laws of the Kingdom of Great Britain, and as such, by virtue of its compliance with the statutes of the State of Montana, entitled to do and transact a mining business, and to have, hold, use, and enjoy mining property therein, with all the rights, privileges, and immunities incident thereto and usually had and enjoyed in connection therewith.

II.

That plaintiff, as such corporation, was and is the owner of, in the actual possession, and entitled to the possession of what is known and designated as the St. Louis Quartz Lode mining claim, with all the quartz rock and ore contained in any and all veins, lodes, or ledges containing precious metals, throughout their entire depth, the tops or apexes of which lie within the surface lines of the said St. Louis Quartz Lode mining claim, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side lines of said surface location, which said mining claim is situate and being in Ottawa mining district, in the county of Lewis and Clark, State of Montana, and is more particularly described as follows, to wit:

"Beginning, for the description of lots Nos. 54 and 55 A, at Corner No. 1, a granite stone 16 x 12 x 12 inches marked 1. M. C. 54, a mound of stones alongside, from which the quarter section corner on south boundary of section 33 in township 12 north, of range 6 west of the principal meridian, bears south 74 degrees and fifteen minutes east 353 feet distant.

"Thence, first course, magnetic variation 19 degrees east, south 21 degrees and 15 minutes west, 102 feet intersect line between townships 11 and 12 north of range 6 west, a granite stone 15 x 14 x 12 inches, marked 54 M. C. 55 A. 450 feet to a point from which a shaft bears north 77 degrees west 285 feet distant, and from said shaft an open cut 3 x 5 feet,

100 feet long, runs south 54 degrees east, six hundred and five feet to a point from which a shaft bears west 153 feet distant, 1,097 feet to corner No. 2, a slate stone 20 x 12 x 5 inches, marked 2. M. C. 55 A., a mound of stone alongside, from which the center of discovery shaft bears north 35 degrees 30 minutes west 289 feet distant.

"Thence, second course, magnetic variation 19 degrees east, south 51 degrees 30 minutes west, 403 feet to corner No. 3, a slate stone 14 x 10 x 4 inches, marked 3. M. C. 55 A., a mound of stones alongside, from which the southeast location corner bears south 10 degrees east 435 feet distant.

"Thence, third course, magnetic variation 19 degrees east, north 45 degrees 30 minutes west, 600 feet to corner No. 4, a granite stone 20 x 8 x 7 inches, marked 4. M. C. 55 A. a mound of stones alongside, from which the southwest location corner bears south 79 degrees west 18. feet distant.

"Thence, fourth course, magnetic variation 19 degrees east, north 51 degrees 15 minutes east 425 feet to corner No. 5, a granite stone 16 x 12 x 6 inches, marked 5. M. C. 55 A., a mound of stones alongside.

"Thence, fifth course, magnetic variation 19 degrees east, north 21 degrees 25 minutes east 529.7 feet distant intersects said township line, a granite stone 18 x 14 x 7 inches, marked 55 A. 54 M. C. 1,069 feet to corner No. 6, a granite stone 16 x 13 x 6 inches, marked 6. M. C. 55 A. from which a fir tree 13 inches in diameter marked 6 M. C. 54 B. T. bears north 15 degrees east 24 feet distant, and a pine tree 5 inches in diameter marked 6. M. C. 54 B. T. bears south 54 degrees east, 21.5 feet distant.

"Thence, sixth course, magnetic variation 19 degrees east, south 45 degrees 30 minutes east, 515.5 feet to corner No. 1 of lot No. 40, the Drumlummon Lode claim 579 feet to corner No. 1, the place of beginning, said lots Nos. 54 and 55 A. extending 1,500 feet in length along said St. Louis vein or lode—the granted premises in said lots containing 18.19 acres."

And that the right and title of plaintiff to said mining claim and veins, lodes, and ledges aforesaid was acquired by virtue of a United States patent therefor to one Charles Mayger, and by him duly deeded to plaintiff herein prior to the commencement of this suit.

III.

And plaintiff further alleges that as a part and parcel of said mining claim for which said United States patent was obtained, as aforesaid, it was and is the owner of, in possession and entitled to the possession of all the said veins, lodes, or ledges bearing gold, silver, lead, cinnabar, and other precious metals so having their tops or apexes within the surface boundaries of the said St. Louis mining claim, as hereinbefore described, as against said defendants and all persons whomsoever, as well as all such veins, lodes, or ledges having any part of their tops or apexes inside of said surface boundary lines by reason of the prior location and patenting of said mining claim, together with the right to follow the same on the dips or angles thereof laterally from the place of intersection of any portion of the tops or apexes of said veins, lodes, or ledges with said side lines of the surface location of its said mining claim, ascertained and defined by vertical planes extending downward parallel with the end lines of its said mining claim at the place of intersection thereof with any portion of said tops or apexes of such veins, lodes, or ledges, and that the said mining claim and the said lodes, ledges, and veins are only valuable for the quartz rock and ore and precious metals therein contained, and on account of which the same is of great value.

IV.

Plaintiffs further allege that, notwithstanding the rights of plaintiff in the premises, said defendants, on or about the 30th day of June, 1893, wrongfully, unlawfully, and wilfully entered upon one of the veins, lodes, or ledges bearing gold, silver, lead, and other precious metals, and so having its top or apex within the surface location of the said mining claim of plaintiff and within the vertical planes aforesaid, and which said vein or lode, having continued in its strike

for some distance parallel with the said boundaries aforesaid, passed out of the eastern side line of said plaintiff's said mining claim, and which has in its dip or angle in an easterly direction and in its course passed outside of vertical planes extended downward upon said east side line of said mining claim, near the southern portion thereof, and in its dip or angle entered beneath the mining property claimed or pretended to be claimed by the said defendants of some of them, and that in utter disregard of the right and title of plaintiff the said defendants ever since have been and now are extracting and taking therefrom large quantities of quartz rock and ore bearing gold, silver, lead, and other precious metals and so lying within the premises of plaintiff so hereinbefore set forth, and have converted the same to their own use and benefit, to the great damage of plaintiff in the sum of $200,000.00.

Wherefore plaintiff prays judgment against said defendants for said sum of $200,000.00, damages sustained by reason of the trespass aforesaid, together with its costs in this behalf expended.

McConnell, Clayberg & Gunn,
Toole & Wallace,
Attorneys for Plaintiff.

State of Montana,
County of Lewis & Clark, ss:

William Mayger, being first duly sworn, makes oath and says that he is the general manager and superintendent of the plaintiff corporation and is agent thereof; that he has read the foregoing complaint and knows the contents thereof; that the matters and facts therein stated are true to the best of his knowledge, information, and belief.

William Mayger.

Subscribed and sworn to before me this 14th day of September, A. D. 1893.

HARRY YAEGER,
Notary Public.

[SEAL.]

(Endorsed:) No. 291. U. S. Circuit Court, Dist. of Montana. St. Louis Mining & Mill'g Co. of Montana *vs.* Montana Mining Co., Limited, *et al.* Complaint. Filed Sept. 16th, 1893. Geo. W. Sproule, clerk. McConnell, Clayberg & Gunn and Toole & Wallace, atty's for pl'ff.

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify that the foregoing is a full, true, correct, and compared copy of the original complaint in the case of the St. Louis Mining and Milling Company of Montana, plaintiff, *vs.* Montana Mining Company (Limited) *et al.*, defendants, No. 291, as the same appears of record and on file in my office as such clerk.

In witness whereof I have hereunto set my hand and affixed the seal of said circuit court, at Helena, Montana, this 22d day of October, A. D. 1906.

GEO. W. SPROULE, *Clerk*,
By C. R. GARLOW,
Deputy Clerk.

[SEAL.]

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing to be a full, true, and correct copy of "Certified copy of original complaint, filed at request of Mr. W. E. Cullen Nov. 13, 1906," in the cause entitled Montana Mining Company, Limited, plaintiff in error, *vs.* St. Louis Mining and Milling Company of Montana, defendant in error,

No. 1240 in said Circuit Court of Appeals, as the original thereof remains on file in my office.

Attest my hand and the seal of said Circuit Court of Appeals, at San Francisco, California, this 23d day of November, A. D. 1906.

[SEAL.] F. D. MONCKTON, *Clerk.*

(Endorsed:) Certified copy of original complaint. Filed at request of Mr. W. E. Cullen Nov. 13, 1906. F. D. Monckton, clerk.

IN THE CIRCUIT COURT OF THE UNITED STATES, NINTH CIRCUIT, DISTRICT OF MONTANA.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, *Plaintiff*,

vs.

MONTANA MINING COMPANY, LIMITED, *Defendant*.

The plaintiff in the above-entitled action for amended and supplemental complaint, by leave of court first had and obtained, complains of the defendant therein, and for cause of action alleges.

I.

That at the several dates hereinafter mentioned this plaintiff was, and now is, a corporation duly organized and existing under the laws of the then Territory (now State) of Montana, under the corporate name of St. Louis Mining and Milling Company of Montana, and as such was and is entitled to own, enjoy, and possess mining property in the said State, with all the rights, privileges, and immunities incident and appurtenant thereto; and that at said dates the said defendant, Montana Mining Company, Limited, was and now is a foreign corporation, incorporated under the laws of Great Britain, and as such corporation, by virtue of its compliance with the laws of the then Territory (now State) of Montana, was and is entitled and authorized to do and transact business in said State.

II.

That at the times hereinafter mentioned this plaintiff, as such corporation, was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain

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Office Supreme Court, U. S.
FILED.
DEC 4 1906
JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING CO. OF MONTANA, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

CHAS. J. HUGHES, JR.,
W. E. CULLEN,
Attorneys for Plaintiff in Error.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24098

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

vs.

THE ST. LOUIS MINING AND MILLING CO. OF MONTANA, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This action was brought by defendant in error in September, 1893, in the United States Circuit Court for the District of Montana, against The Montana Mining Company, Limited, plaintiff in error, and Rawlinson T. Bayliss, Alexander Burrell, Nicholas Francis, Isaac Warren, Joseph Harvey, John Jewell, and Thomas Hawkins, to recover damages against them in the sum of $200,000 for ores alleged to have been mined by them from a lode alleged to have its top or apex within the surface boundaries of its St. Louis mining claim, and in connection therewith to try the title to the lode from which it was alleged ore had been mined and which defendant in error claimed to own. In paragraph

1 the complainant alleged that the plaintiff was a corporation organized and existing under the laws of the State of Montana, and as such authorized to hold, have, possess, use, and enjoy mining properties in said State, with all the rights, privileges, and immunities incident and appurtenant thereto and usually had, held, used, and enjoyed in connection therewith, and that the defendant, plaintiff in error here, was a corporation incorporated and organized under the laws of the Kingdom of Great Britain, and as such, by virtue of its compliance with the statutes of the State of Montana, entitled to do and transact a mining business and to have, hold, use, and enjoy mining property therein, with all the rights, privileges, and immunities incident thereto and usually had and enjoyed in connection therewith (Supp. Record).

In paragraph 2 it was alleged that the plaintiff, as such corporation, was the owner of and entitled to the possession of the St. Louis Quartz Lode mining claim, and all veins, lodes, or ledges containing precious metals throughout their entire depth the tops or apexes of which lie within the surface boundaries of the St. Louis Quartz Lode mining claim extended downward vertically, and there is then described the mining claim by reference to the corners and survey calls therefor (Supp. Record).

In paragraph 3 (Supp. Record) an allegation is made as to the ownership of all veins having their tops or apexes within the surface boundaries of the St. Louis mining claim.

Paragraph 4 (Supp. Rec.) alleges the violation of the ownership of the plaintiff by the defendants, it being claimed that the defendants entered upon the property belonging to the plaintiff, and that the defendants entered beneath the mining property claimed or pretended to be claimed by the said defendants, or some of them, and took ore to the value of $200,000, for which judgment was claimed.

The plaintiff permitted its action to lie dormant until the 21st day of November, 1898, when, on its motion, by leave of court, over the objection of the defendants, it filed its

amended complaint (Supp. Record). From this complaint the individual defendants were omitted and the complaint defined with greater certainty and particularity the veins upon which it was alleged the trespass had been committed and the territory upon which it relied for ownership of the ore it sought to recover and the facts raising the federal questions upon which jurisdiction of the United States Circuit Court was based.

On June 26, 1899, the plaintiff filed its second amended and supplemental complaint, upon permission of court granted over defendants' objection, which is the complaint appearing herein (Record, pp. 1-5, both inclusive). In this complaint it is alleged that the plaintiff is the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis Quartz Lode mining claim, "and of the quartz, rock and ore and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie *within* the surface boundaries of the said *fractional* portion of said St. Louis Lode mining claim" (Record, p. 2).

From this general claim of ownership and right the plaintiff makes the following exception:

> "Save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis Lode mining claim is designated as follows, to wit:"

Then follows a description of the compromise ground by metes and bounds, concluding as follows, to wit:

> "Including an area of about 12,844 50-100 square feet, *together with all mineral contained therein.*"

It is then alleged that plaintiff in error "is and was the owner of what is known and designated as the Nine Hour

Lode mining claim, situate and being east of the said St. Louis Lode mining claim and including the 30-foot strip or compromise ground aforesaid" (Record, p. 2).

The allegations as to the incorporation and capacity to do business and hold property contained in the original complaint are repeated in this complaint (Record, pp. 1-2).

In paragraph 3 it is alleged that the Montana Mining Company was the owner of the Nine Hour claim, situated east of the St. Louis claim and including the 30-foot strip or compromise ground (Record, p. 3).

In paragraph 4 it is alleged that the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the St. Louis claim is to the east and dips under and beneath the Nine Hour Lode mining claim, including the 30-foot strip or compromise ground, which said portion of said vein has its top or apex within the St. Louis mining claim, as is then specifically described, beginning at a projected parallel end line of the St. Louis claim at a point on the east line between corners 1 and 2 extended downward vertically, whereat it passes through the hanging wall of said vein at a point from which corner No. 1, being the northeast corner of the St. Louis claim, bears north 12 degrees 15 minutes east, distant 520 feet, where said hanging wall is disclosed at the surface by an upraise of said projected parallel end line 5 feet west of the east side line of said St. Louis Quartz Lode mining claim; thence, from where the said projected parallel end line passes through said east side line of said claim, and along the east side line of the said claim between corners Nos. 1 and 2, south 21 degrees 15 minutes west, 512 7-10 feet to a point, being the intersection of the said east side line of said St. Louis Quartz Lode mining claim, between corners Nos. 1 and 2, with the west line of the 30-foot strip; thence south 59 degrees 50 minutes west 106 feet and along the west line of the 30-foot strip to a projected parallel end line of the St. Louis claim extended vertically downward,

which passes through the hanging wall of said vein at the surface and at the crossing of the said hanging wall with the west line of the said 30-foot strip.

And, in addition to this allegation, the following:

> "That it is also the owner of, in possession and entitled to the possession of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of twenty-five feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis Lode mining claim" (Record, p. 4).

The complaint refers to a map or plat showing the point at which the said vein enters the said St. Louis Lode mining claim as described in the complaint, and whereat the same departs therefrom upon the east line of said claim, which is attached to the complaint, marked Exhibit "A," and made a part of the complaint, which is found between pages 4 and 5 of the record.

This allegation shows that apex rights are based upon a vein which crosses the same side line, made up of two lines, of the St. Louis claim, and also claims extralateral rights where only a portion of the width of the apex is contained within the property alleged to be owned by the plaintiff.

THE ANSWER.

To this complaint the defendant, plaintiff in error here, answered (Record, pp. 7-12), admitting the allegations of the first three paragraphs of the complaint and interposing a general denial as to each and every other allegation thereof. The defendant further alleged in its answer that the plaintiff was estopped from claiming any of the mineral found, or which might thereafter be found, in the *30-foot strip* or compromise ground, because theretofore and on or about the 7th day of March, A. D. 1884, one Charles Mayger, who was plaintiff's predecessor in interest, had made, executed, and

delivered to William Robinson, Jasper Huggins, and Frank P. Sterling, who were the predecessors in interest of the plaintiff in error herein, a bond for a deed, wherein and whereby he covenanted and agreed to convey the said compromise ground to the obligees therein named or their assignees, *together with all of the mineral therein contained;* that after the said Mayger had obtained a patent for the said St. Louis mining claim, including said thirty-foot strip or compromise ground, he, the said Mayger, in order to cheat and defraud the defendant, had assumed to convey the compromise ground to the plaintiff, the defendant in error here; that, upon a demand having been made for a deed and refused, the defendant, on or about the 6th of September, 1894, brought an action in the District Court of the First Judicial District of the State of Montana within and for the county of Lewis and Clark, to enforce the specific performance of said bond for a deed; that thereafter such proceedings were had as that on or about the 1st day of June, 1895, judgment was duly entered in favor of the plaintiff therein and against the said defendant, whereby it was adjudged and decreed that the said bond be specifically performed, and that the said plaintiff should make, execute, and deliver to this defendant (the plaintiff in error here) a good and sufficient conveyance, in fee simple absolute and free of all encumbrance, of and for the premises described in said bond and the whole thereof, together with the mineral therein contained; that in pursuance of such decree the plaintiff, on or about the 1st day of July, 1905, had made a deed to the defendant for said premises and for all of the mineral therein contained. A copy of the bond for a deed and a copy of the deed were attached to the answer as exhibits (Record, pp. 7 to 12, both inclusive).

THE REPLICATION.

(Record, pp. 13-15).

The plaintiff, for replication, first denied that it was estopped for any of the causes or reasons set up in defendant's answer, and then admitted that the bond was executed as stated in the answer, as follows:

> "That the said Mayger agreed to convey said thirty-foot strip or compromise ground, with all of the minerals therein contained, to the predecessors in interest of the said defendant, and avers that the said claim of plaintiff comprises no minerals contained in or beneath said thirty-foot strip or compromise ground except such as is contained in leads, lodes or ledges which have their tops or apexes within the St. Louis Quartz Lode mining claim, exclusive of said thirty-foot strip or compromise ground."

And for further reply the plaintiff alleged that the compromise ground was a portion of the Nine Hour claim, and that no other right or title had been conveyed by reason of said deed than such as was attached and incident to said thirty-foot strip, and that the minerals therein contained were intended to comprise, and did comprise only such minerals as were contained in veins, lodes or ledges having their tops or apexes inside of the thirty-foot strip.

It is then alleged that the compromise ground was at all times a part of the Nine Hour claim, and was never any part of the St. Louis claim, and that this fact was adjudged in the Specific Performance case, which was brought for the purpose of compelling the defendants therein to make a deed for the thirty-foot strip, and that it was found and determined by the court as a matter of fact that the thirty-foot strip was at all times a part of the Nine Hour claim, and that the said agreement, a copy of which was attached to the

answer, was made and given for the purpose of settling, determining, and fixing the boundary line between the Nine Hour and the St. Louis mining claims, the boundaries of which were at the time of the execution of said agreement in conflict.

> "And plaintiff further alleges that the *deed* mentioned in said answer, and a copy of which is annexed, is the *deed* which the court adjudged in said action should be executed for the purpose of performing the agreement above referred to" (Record, pp. 13 and 14).

NEW MATTER IN REPLY AT ISSUE.

At the time this reply was filed the following section of the Code of Civil Procedure of the State of Montana was, and yet is, in force, to wit:

> "SEC. 754. Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer, not controverted by the reply, where a reply is required, must, for the purposes of the action be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter in a reply, is to be deemed controverted by the adverse party."

Upon these issues this cause was first tried before District Judge Hon. Hiram Knowles and a jury, in the United States Circuit Court for the District of Montana, commencing on the 8th day of August, A. D. 1899. After the jury had been empanelled the defendant objected to the introduction of any testimony on the part of the plaintiff, for that the second amended and supplemental complaint, which had been theretofore read to the jury, did not state facts sufficient to constitute a cause of action and did state facts showing that the plaintiff had no cause of action. The court overruled such objection and permitted the plaintiff to offer testimony;

to which ruling of the court the defendant then and there duly excepted. (See Transcript of Record, October term, 1901, No. 213, p. 16.)

Thereafter such proceedings were had in said action as that, the jury having found a verdict against this defendant, a judgment was, on or about the 16th day of August, 1899, entered against the defendant in the sum of $23,209, with costs.

The defendant therein (plaintiff in error here) sued out a writ of error to remove the said cause into the United States Circuit Court of Appeals for the Ninth Circuit; and thereafter such proceedings were had in the said Circuit Court of Appeals as that the said court, on or about the 14th day of May, A. D. 1900, affirmed said judgment in all things (102 Fed. Rep., 130).

The said Circuit Court (Rec. Oct. Term 1901, No. 213, p. —) on the trial of said cause having limited the plaintiff to proof of damages to such ores as were mined out of the compromise ground north of its 108-foot plane, which was a projected line drawn down parallel to what were claimed to be the end lines of its St. Louis claim at the point where the hanging wall of the lode crossed the westerly side line of the compromise ground, and having refused to permit it to prove damages for ores mined out of said compromise ground southerly of said 108-foot plane and between that point and what it termed its 133-foot plane, which was likewise a projected line drawn down parallel to its claimed end lines at the point where the foot wall of said vein crossed the westerly side line of the compromise ground, the plaintiff having previously settled a bill of exceptions, on or about the 29th day of January, A. D. 1900, sued out a writ of error to remove said cause into the Circuit Court of Appeals for the Ninth Circuit for review upon its bill of exceptions, all of which will more fully appear, reference being had to the Transcript of Record in Cause No. 214 of the October term, 1901, of this court.

Such proceedings were had in said cause in said Court of Appeals as that, on or about the 8th day of October, 1900, it was therein adjudged "that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed with costs, and the cause is remanded to said Circuit Court for a new trial as to damages alleged and recovery sought for the conversion and value of certain ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes." (Rec. in 214, Oct. Term, 1901, p. —.)

THE CASE IN THE SUPREME COURT.

The Circuit Court of Appeals affirmed the judgment of the Circuit Court upon plaintiff in error's writ of error, and while it had reversed the same judgment on the writ of error sued out by the defendant in error remanded the case for a new trial as to damages alleged and recovery sought "for the conversion and values of certain ores taken from the Drumlummon vein on its dip between the planes designated as the 108 foot and 133 foot planes." The judgment entered was to stand, and in case the jury returned a verdict in the St. Louis Company's favor, it was to have a new and second judgment in the same case for the ores mined out between the two planes. After vainly trying by motions for rehearing and petitions to correct what plaintiff conceived to be erroneous action on the part of the Circuit Court of Appeals in this cause, and otherwise to secure relief in the Court of Appeals, the plaintiff in error sued out a writ of error upon each of said decisions to this court. It was manifest that if the plaintiff in error permitted the case to go back to the Circuit Court for new trial and an additional judgment, as was ordered by the Circuit Court of Appeals, it would thereby lose, as a result of the lapse of time, its right to have the first judgment, which stood affirmed by the Circuit Court of Appeals, reviewed by this court. Upon the theory that the

judgment entered on the writ of error sued out by plaintiff in error, by virtue of its affirmation by the Circuit Court of Appeals, was final, and that some method must be found in this court of reuniting the cause, which had thus been separated, by consolidating the segment which had been split off by the writ of error sued out by the defendant in error, and which had become a part of the case in the records of the Court of Appeals, with the portion of the case wherein there was a judgment standing against the Montana Company, the plaintiff in error sued out a writ of error from this Court to the Circuit Court of Appeals in both cases. The decision of this court on these two writs of error is reported in 186 U. S., 24, and therein this court declined to pass upon the merits of the controversies involved in the litigation, but held that the Circuit Court of Appeals, in granting the new trial to the defendant in error, had vacated the judgment it had affirmed upon the writ of error prosecuted to that court from the Circuit Court by the Montana Company, and therefore there was no final judgment from which a writ of error could be prosecuted to the Supreme Court from the Circuit Court of Appeals.

REMANDED TO COURT OF APPEALS.

A mandate from this court having been filed in the Court of Appeals, motion made by the plaintiff in error to reunite the case and remit it to the Circuit Court for a new trial by a single remittitur. On this motion, the Court of Appeals, on the 8th day of October, 1902, after reciting the two former judgments entered an order as follows, to wit:

> "It is now ordered and adjudged that the judgments as heretofore made and entered be *vacated* and *set aside*, and in lieu thereof it is ordered and adjudged that the judgment of the said Circuit Court in this cause be and the same is hereby reversed with costs, and that the cause be remanded to said Circuit Court for a new trial" (Record, p. 19).

THE RETRIAL.

On the retrial of the case before Judge William H. Hunt and a jury, while the trial court would not and did not in terms hold that it was in strictness bound to apply the doctrine of *"the law of the case,"* yet it held that it was showing only proper respect for the opinions of an appellate court to follow such decision, whether they were or were not *"the law of the case"* (Record, pp. 23, 24, 25, 55, 56, 57). Not only did the court apply the doctrine of "the law of the case" to the plaintiff in error with the greatest strictness, confining its decisions, both as to law and fact, to what was found decided in one or the other of the opinions of the Court of Appeals or referred to therein as a fact, but went much further, following what it assumed was the spirit of those decisions.

The plaintiff (defendant in error here) was by the trial court permitted to introduce evidence in support of its contention with reference to the case, additional to that which had been introduced in the former trial, and upon points not covered thereby, while the defendant (plaintiff in error here) in every instance was limited to what the record showed to have been the evidence on the former trial of the case, the court proceeding evidently upon the idea that while the plaintiff in the court below was at liberty to introduce evidence to support its contentions, the plaintiff in error (defendant there) was not permitted to introduce evidence to show a different state of facts from that which had been disclosed in the record before the Circuit Court of Appeals when the new trial was granted, and contradicting the facts upon which certain conclusions were therein drawn, or showing their non-existence, or to contradict the things proved or attempted to be proved for the first time by the plaintiff in its evidence in the second trial, or to disprove things which the plaintiff had been permitted to prove in the former trial, and was permitted again to introduce evidence in support of at the second trial (Record, pp. 55-58).

As illustrating what we mean, we call attention to page 52 of the record, where the plaintiff was allowed to introduce records in other suits, not at all connected with the case then on trial. The defendant, however, on the other hand, was held down with unrelenting strictness to the former record, as, for example, when it offered the original complaint in the Adverse claim suit (Record, p. 65), it was rejected, and in some instances evidence that had gone in before was rejected when objected to by counsel for the plaintiff (Record, p. 77). We call attention to these, and might call attention to many more, as tending to show that on the retrial the doctrine of "the law of the case" was applied with more than usual strictness.

THE SPECIFIC PERFORMANCE CASE.

The judgment roll in the Specific Performance case appears in the record here, pages 41 to 54, both inclusive. From the judgment in this case the defendant in error prosecuted an appeal to the Supreme Court of the State of Montana, which approved the judgment of the District Court and the opinion in the case will be found reported in the 20 Mont., 394. From the judgment affirming the decree of the court below the defendant in that case (the defendant in error here) sued out a writ of error and brought the judgment into this court and this court affirmed the judgment of the Supreme Court of Montana (171 U. S., 650).

In this connection we call attention to the position on the part of the defendant in error as to the exact *status* of the compromise ground. In the bond for a deed (Record, p. 10) it is referred to as "comprising a part of two certain quartz lode mining claims known as the St. Louis Lode claim and the Nine Hour Lode claim." In the answer in the Specific Performance case (Record, p. 46) it is averred "that the same was and is a part of the St. Louis Lode

mining claim, designated and known as such, and embraced and included in the United States patent obtained by the said defendant Charles Mayger, for said St. Louis Lode mining claim;" and the answer, after denying that Mayger had wrongfully or otherwise extended the easterly line of the St. Louis over the Nine Hour claim, avers by way of an admission "that he caused a survey to be made of the same and averred that the boundary lines of said St. Louis mining claim, *as originally located*, included and embraced the said *locus in quo* and every part thereof at and prior to the location of the said Nine Hour Lode mining claim."

In the complaint in the case at bar (Record, p. 1) the compromise ground is found embraced in the general description of what is the St. Louis lode, and in describing the compromise ground (Record, p. 3) we find this language, viz: "which said fractional portion of said *St. Louis Lode mining claim* is described as follows, to wit."

Notwithstanding this, we find it alleged in the replication (Record, p. 14) that the compromise ground "comprised a part and portion of what was known as the Nine Hour Lode claim;" and again:

> "And plaintiff alleges the fact to be that the said thirty-foot strip, or compromise ground was at all times a part and portion of the quartz lode mining claim, known as the Nine Hour mining claim, and that the same was never a part or portion of the St. Louis Quartz Lode mining claim mentioned in the complaint herein."

And all of these pleadings were verified by the same person, who is now and at all times since its organization has been the general manager of the defendant in error. In view of the noticeable uncertainty of the defendant in error as to what the real *status* of the compromise ground is, we beg to most respectfully suggest that it ought not to feel aggrieved if this honorable court should find it either the one or the other, as the ends of justice might require.

MATERIAL FACTS ESTABLISHED BY THE TESTIMONY.

We purpose calling attention to a few significant facts appearing in the record, and in doing so we will refer to the proof offered by the plaintiff in error and rejected by the court, precisely as if the several witnesses had been allowed to testify to the matters we were offering to prove by them. On a review of the case of this character, the evidence offered, so far as it is relevant and material to the issues and which should have been admitted, ought to stand and does stand on exactly the same plane as that of the evidence actually given.

a. The St. Louis was originally the "Ivanhoe." The relocation of the ground as the St. Louis was made by Charles Mayger, by direction of his brother William Mayger, on or about September 28, 1898 (Record, p. 26). This relocation having been made before the year expired for the performance of the annual labor required of the owners of the Ivanhoe, the conclusion may logically be drawn that in making this location Mr. William Mayger, in miners' parlance, "*jumped the Ivanhoe.*"

b. That the "discovery shaft" of the St. Louis is that shaft which is marked on the map (Plaintiff's Exhibit 1) as the 65-foot shaft, and that the discovery vein at the St. Louis was the small vein appearing a few feet below the bottom of this shaft (Record, p. 26).

c. That the St. Louis claim was intended to be fifteen hundred feet in length by six hundred feet in width; that it was a parallelogram, having four corners and no more, and that its easterly and every other boundary was, and was intended to be, a straight line (Record, p. 38).

d. That the location was not made along but diagonally across the claim as staked; that if it continues in its own direction the discovery vein of the St. Louis would pass out of the easterly boundary line of the location between survey corners Nos. 1 and 2, about 590 feet south of corner No. 1; that at the other end it falls into the Transcontinental fissure and is lost, or if it continues it is found in an undeveloped fissure on the southwesterly side of the tunnel and 15 or 20 feet out, or westerly, from the point where the St. Louis discovery vein drops into the Transcontinental fissure (Record pp. 79, 71, 72).

e. That though Mr. William Mayger had been a part owner in the "Ivanhoe," when the ground was relocated by his brother Charles Mayger as the St. Louis he had no interest in it (Record, pp. 26, 27); yet he paid the expense of fighting the Adverse Claim suit and of patenting the ground; that he organized the defendant in error, the St. Louis Mining and Milling Company of Montana, and that after putting $125,000 of the capital stock into the treasury the remainder of such capital stock was divided equally between himself and his brother Charles (*ibid.*).

f. That when William Robinson afterward discovered the Nine Hour he knew where the easterly side line of the St. Louis was; that it was a single straight unbroken line from the northeast corner stake (now survey corner No. 1) to the southeast corner stake of the said claim; that in staking the Nine Hour he so set the northwest and the southwest corner stakes of his Nine Hour claim as to leave an open unclaimed strip of ground between the westerly line of his Nine Hour and the easterly line of the St. Louis, which strip at the north end of his Nine Hour was fifty (50) feet in width and was twenty-five (25) feet in width at the south end of the St. Louis, and that the stakes so originally set by him for the purpose of marking said westerly line were never thereafter changed (Record, pp. 60, 63, 64).

g. That there was no conflict of the surface boundaries of the two claims until a short time prior to the survey of the St. Louis for patent; that just prior to such survey the southeast corner stake of said St. Louis was secretly, wrongfully, and fraudulently moved about four hundred (400) feet further up the mountain and to a point near the easterly line of the Nine Hour where no stake had ever stood before. (Record, pp. 60, 64.)

h. That when Mayger made his survey for patent he started at the northeast corner of his St. Louis claim and ran in the direction of the stake which had been fraudulently placed on the Nine Hour claim until he reached a point which is now corner No. 2 of his survey, at which point he caused a mineral corner to be put in at a point where there never had been a stake or monument before; there, turning an angle to the right, or westerly, he ran to what is now corner No. 3 of his survey, and which point was on the defendant's Nine Hour claim, and at corner No. 3 put in a corner where there had not been any corner of a mining claim theretofore. (Record, pp. 60, 61.)

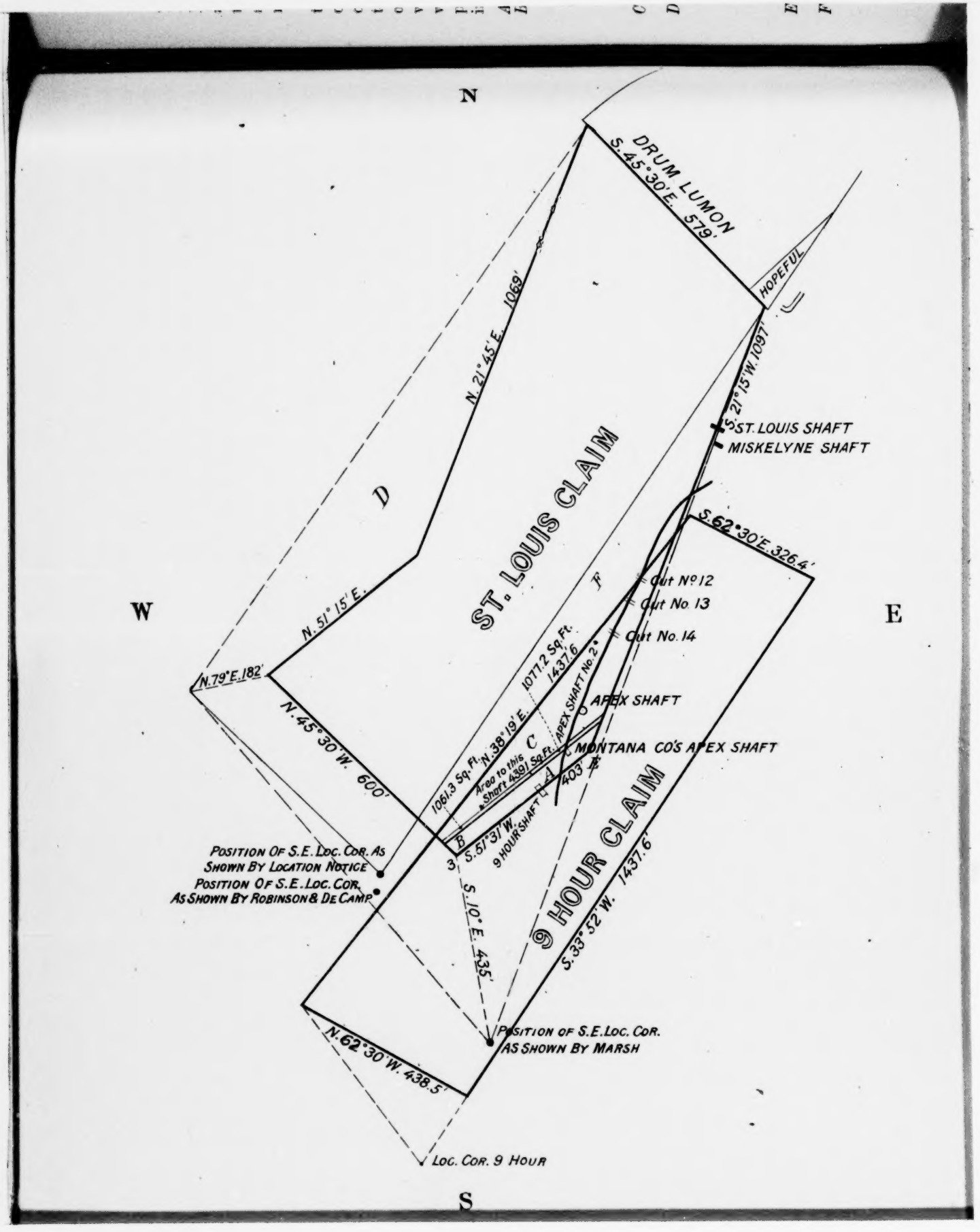
i. That by the unlawful extension of the east side line of the St. Louis over said Nine Hour surface the said line was made to run between corners Nos. 2 and 3 thereof within ten and one-half feet of the center of the Nine Hour discovery shaft, and there was wrongfully included in such St. Louis survey 1.98 acres of the surface of said Nine Hour (Record, pp. 55, 59, 65; plat opposite p. 76; map, Exhibit E, p. 55).

j. That thereafter, and upon the said Mayger filing an application to enter the St. Louis claim as so surveyed, the said William Robinson, Warren De Camp, John W. Eddy, and Frank P. Sterling, owners of the Nine Hour, filed an adverse claim in the United States land office wherein such

application was made, and thereafter and within the time allowed commenced an action in the District Court of the First Judicial District of the Territory of Montana within and for the county of Lewis and Clark, to determine who was entitled to the possession of the area (1.98 acres) so in conflict, as aforesaid; that thereafter and on or about the 7th day of March, 1884, the said adverse claim and suit was settled between the parties by the making, execution, and delivery of the bond appearing on page 9 of the transcript of record herein. At and prior to the execution and delivery of said bond it was expressly understood and agreed between the parties that in consideration of their giving up the ground in conflict, outside of the 30-foot strip, they were to have all of the ores and quartz rock that laid under the surface of the compromise ground regardless of where the apex of the vein in which such ores were found might be (Record, p. 60); that it was talked over and distinctly agreed that apex rights should be cut off, and Mayger agreed to forego all extra-lateral rights in the part of the premises to be conveyed (Record, p. 62).

k. That by evidence offered, but which the defendant was not permitted to introduce and which the record therefore does not contain, it would have been established that Mr. Mayger has beaten the owners of the Nine Hour out of a strip of ground nine and one-half (9½) feet in width. The bond (Record, p. 10) calls for a starting point of survey fifty (50) feet distant from the center of the Nine Hour discovery shaft. The actual point where the survey was started was 40½ feet from the center of discovery shaft, or 10 feet 6 inches to the easterly line and thirty (30) feet to the westerly line of the compromise ground (Record, p. 55).

l. Mr. Mayger and the defendant in error have repudiated or sought to repudiate every contract, whether oral or written, that it ever made with the Nine Hour owners, for while


N
W
E
S
DRUM LUMON
S. 45° 30' E. 579'
HOPEFUL
N. 21° 45' E. 1069'
S. 21° 15' W. 1097'
ST. LOUIS SHAFT
MISKELYNE SHAFT
ST. LOUIS CLAIM
D
F
S. 62° 30' E. 326.4'
Cut No 12
Cut No. 13
Cut No. 14
N. 51° 15' E.
N. 79° E. 182'
1077.2 Sq. Ft.
1437.6
APEX SHAFT No. 2
APEX SHAFT
N. 45° 30' W. 600'
N. 38° 19' E.
C
MONTANA CO'S APEX SHAFT
1061.3 Sq. Ft.
Area to this Shaft 439.1 Sq. Ft.
403'
A
B
S. 51° 31' W.
9 HOUR SHAFT
POSITION OF S.E. LOC. COR. AS SHOWN BY LOCATION NOTICE
POSITION OF S.E. LOC. COR. AS SHOWN BY ROBINSON & DE CAMP
S. 10° E. 435'
9 HOUR CLAIM
S. 33° 52' W. 1437.6'
POSITION OF S.E. LOC. COR. AS SHOWN BY MARSH
N. 62° 30' W. 438.5'
LOC. COR. 9 HOUR

admitting the execution of the bond for a deed, it pleads, and he verifies the pleading, "that the said adverse claim aforesaid was interposed for the purpose of harassing and delaying said Mayger from obtaining a patent to said St. Louis mining claim, and that the said bond was executed as a compromise to avoid the same; all of which was done contrary to equity and good conscience and for the sole purpose aforesaid," and he prays that the same may be decreed to be null and void (Record, pp. 48-49).

On the opposite page will be found a diagram or map of the two claims, which may serve to give a clearer impression of the situation than can be obtained from the text. It was originally made from a photograph of the surface map of the plaintiff in error herein, marked Exhibit "E," and one of the maps accompanying the record herein. This map was made by Mr. John H. Farmer, a mining engineer, and was introduced in evidence on the trial of the case (Record, p. 55). We make the following explanation of what is indicated by the several letters found upon the map:

A is the Nine Hour Discovery shaft.

B is the compromise ground, between corners Nos. 2 and 3 of the St. Louis claim. The western line shown is where the line would have been had the survey been started in accordance with the terms of the bond, at a point at right angles to the St. Louis line between corners Nos. 2 and 3 and 50 feet distant from the center of the Nine Hour discovery shaft.

C is the conflicting area between the Nine Hour and the St. Louis.

D shows the St. Louis as originally staked and described in its location notice, the straight dotted line lying to the west of its present westerly boundary line being the original west line of the St. Louis and the southwest corner as shown thereon being the same corner shown in the diagram annexed to the patent of the St. Louis and marked in such diagram "Loc. Cor."

E is the southeast corner stake of the St. Louis after its removal onto the Nine Hour ground.

F is the unclaimed area between the two claims left when the Nine Hour was located.

In the first trial of this case the Circuit Court permitted the defendant in error, The St. Louis Company, to assert, rely upon, and receive judgment upon the theory and claim that it had the apex of ore bodies contained beneath the surface of the 30-foot strip of ground which is described in the second amended complaint at page 3 of the record and indicated upon the plat, Exhibit "A" to said complaint, inserted between pages 4 and 5 of the record, and which said 30-foot strip or compromise ground had been patented to the St. Louis Company as a part of the St. Louis claim, by virtue of an apex claimed to exist within that portion of the ground in conflict between the Nine Hour claim and the St. Louis claim which was retained by the St. Louis Company. This was done upon the theory that notwithstanding the fact that the ground had been patented to the St. Louis Company as a part of the St. Louis claim, and it had deeded the same to the Montana Company, owner of the Nine Hour claim, under the provisions of a compromise contract between the owners of the Nine Hour claim and the St. Louis claim, by which it was agreed that the Nine Hour claimants should dismiss an adverse suit which they had filed, that the St. Louis claimants should patent the ground in conflict between the Nine Hour and the St. Louis claim and convey the 30-foot strip to the owners of the Nine Hour claim, the grantor might assert apex or extralateral rights against his own grant, as provided for in the compromise agreement, in the decree of the District Court of Montana, finally affirmed by the Supreme Court of the United States, and by the deed which was in fact delivered to the Montana Company by the St. Louis Company. This attempt and this action was resisted by the Montana Company, which claimed that it had a contract which provided that the St. Louis Company should patent the ground as a part of the St. Louis claim, and after patent therefor had been obtained should convey the described premises and by said conveyance grant to the Montana Company all the ores which were found beneath the surface thereof, being the very

ores for which the said defendant in error sought to recover upon the alleged ownership of an apex thereto; that the Nine Hour claimants had contracted, as a consideration for a surrender of their larger claim, for this grant, and that the defendant in error was estopped by its contract, the judgment of the District Court of Montana, and its deed from asserting any title to that which it expressly conveyed, and that the Circuit Court of Appeals, when it affirmed this decision of the Circuit Court, in effect, as is claimed and contended by the plaintiff in error, took from the plaintiff in error that which was expressly conveyed to it by the deed which it had therefor. The Circuit Court of Appeals rendered this decision upon the doctrine, as announced by it in 102 Fed., 432, that in interpreting the conveyance in question regard should be had not only to its terms, but to the subject-matter involved and the surrounding circumstances, in order to ascertain the intention of the parties. This theory was combated and is combated by the plaintiff in error, which maintains that the deed and as well the contract providing for it are plain, explicit, and direct; so that there is neither required nor permitted any investigation into surrounding circumstances for the purpose of ascertaining the meaning thereof, which is in no doubt, confusion, or uncertainty whatever.

The Circuit Court of Appeals also in its opinion proceeds upon the theory that the purpose of the settlement and deed was only to fix a surface line between the two claims, and did not deprive the grantor of any extralateral rights to ore under the ground so conveyed, whereas in fact, as the plaintiff in error contends, an adverse suit had been brought to recover all the ground in conflict between the two claims, and what was done was to make a compromise and an agreement that the specific territory, together with all the ore in it, wherever the apex thereof might be, should be conveyed to the plaintiff in error, and that the purpose was not simply to find a surface dividing line, but to dispose of the valuable portion of the controversy, the ore in the ground in dispute.

The Circuit Court of Appeals held that the controversy between the owners of the St. Louis and the Nine Hour claims was one which involved surface lines only, whereas the purpose, as plaintiff in error maintains, was to substitute an agreement of the parties in which mutual concessions were made, in lieu of a determination of the ownership of the surface and the ore and of all rights attached thereto, which would have been reached by a trial of the adverse suit over a conflict in the two claims, in which the Nine Hour claim asserted title to the territory which included the apex upon which the defendant in error now relies, as well as the 30-foot strip it agreed to convey. The plaintiff in error contends that the ownership of the property and that which it contained, and not merely its surface, was involved in the adverse suit.

It is further held by the Circuit Court of Appeals that the compromise was an admission that the Nine Hour claim was just, and upon this holding the court bases in part its decision; whereas the plaintiff in error maintained at all times, and does now, that the owner of the St. Louis claim did not concede that the Nine Hour claim was right or that its claim was just, but that the disputants agreed, in settlement of the controversy, the St. Louis Company should convey, as was provided in the contract, the ground described and all ore in it, in consideration of being relieved from the larger claim, as to territory and the ore contained in it, made by the Nine Hour claimants in the adverse suit.

The Circuit Court of Appeals also bases its decision upon the idea and statement that the conveyance was for all the ground in dispute between the Nine Hour and St. Louis claims, and that unless the St. Louis claim, notwithstanding its contract and deed, should be permitted to apex the ore bodies found beneath the ground it had conveyed, and which by the terms of its deed it conveyed, it would be conveying more to the owner of the Nine Hour claim than it would have secured had it in fact patented as a part of the Nine

Hour claim all the ground in conflict; for it is assumed by the court as the basis of this decision that the apex upon which the defendant in error relies is contained in territory which was not in conflict between the Nine Hour and St. Louis claims. The plaintiff in error, while not conceding that these matters may be entered into, since it contends that the deed is explicit upon that subject, yet asserts and contends that if the surrounding circumstances and the nature of the property are to be considered, then it must be taken into consideration that the court erred in the assumption of fact upon which it proceeded, upon the existence of the circumstances which it assumed surrounded the contract and the deed, and points out in support thereof that in fact the ground deeded is not all the ground which was in conflict between the two claims, and that if in fact the Nine Hour claim had patented all the ground in conflict it would have patented all the apex upon which the defendant in error relies in this litigation.

The Circuit Court of Appeals further holds, with reference to the ore beneath the surface of the 30-foot strip between the 103 and 108 foot planes, that the ground deeded by the St. Louis Company to the Montana Company is junior in date to that portion of the conflict or that territory retained by the St. Louis Company, and therefore, notwithstanding the apex is a divided one, and is not within the territory owned by the defendant in error, it may take the entire width of the vein, beginning on the surface, from the point where it has no apex whatever to the point where it has all the apex, and goes back of the patent and the contract to impress upon the deeded property inferior and junior character as a portion of the Nine Hour claim, while conceding and assuming to the retained property a priority of location as a part of the St. Louis claim.

The plaintiff in error denies the legal right of the court, upon a proper construction of the United States statutes concerning the patenting of claims, to go back of the patent

to ascertain the supposed different ages of portions of the same claim conveyed by the Government by the same patent; denies the right of the court and the defendant in error to go back of the contract and the deed, which recognized no such distinction, but provides for the grant and conveys the territory as a portion of the St. Louis claim under its patent, with all the rights which inure thereto, and which rights and conveyance were accepted in consideration of the surrender, under the compromise, of the larger claim made by and on behalf of the Montana Company as the owner of the Nine Hour claim. Plaintiff in error also claims that in addition to the fact that the defendant in error, within the territory it retained, does not have the apex, but only a part of it, and may therefore not assert extralateral rights with reference to it, under all the circumstances, and with a presumed knowledge of all the legal propositions announced by the court, it or its grantor agreed to convey and it did convey the territory described and all the ore and mineral contained therein, referring to and relying upon the language of the conveyance adjudged to be made to the plaintiff in error by the defendant in error, and which is in the following language (Record, p. 11):

> "Has granted, bargained, sold, remised, released and forever quit-claimed, and by these presents does grant, bargain, sell, remise, release, and forever quit-claim unto the said party of the second part and to its assigns forever, all and singular those certain mining premises, situate, lying and being in Ottawa (unorganized) mining district, in the county of Lewis & Clarke and State of Montana, more particularly bounded and described as follows, to wit: (Here follows description of the 30 foot strip) to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz-rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or ap-

purtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, in or to the said premises, and every part and parcel thereof, with the appurtenances."

In the second trial, notwithstanding the ore was mined from beneath the surface of the ground which the defendant in error had conveyed to the plaintiff in error by the clause of the deed and under the description just stated, the Circuit Court virtually held that the existence of the suit made the plaintiff in error a willful trespasser and entitled the defendant in error to recover punitive damages against it for the ore mined, notwithstanding the plaintiff in error relied, as it did, in good faith upon the conveyance to it of this ore and its consequent ownership thereof, and the Circuit Court of Appeals affirmed a decision based upon an instruction of this character by the Circuit Court to the jury, and the Circuit Court held that the burden was upon the plaintiff in error to establish its right to the ore, instead of leaving the burden of proof upon the defendant in error, which asserted title to the ore which it had conveyed and which was beneath the surface of a claim owned by another, and this holding of the Circuit Court was approved by the Circuit Court of Appeals.

There are other contentions of importance in this case which require the construction of the federal statutes relating to the mineral lands of the United States in their determination, and others which require the application of rules of law which are exhibited in the assignment of errors and in the argument and for that reason are not in this statement specifically set forth. The purpose of this statement is to give to the court a general idea of the nature and

history of the litigation, the questions involved, and the decisions made with reference to them.

The facts, as the plaintiff in error offered to prove them and as by the proof offered and the proof introduced would have been shown, are that the St. Louis Mining claim as located did not cover the territory afterwards in conflict between the St. Louis claim and the Nine Hour claim, and the conflict which was created arose from the fact that after the Nine Hour claim had been located at some distance from the St. Louis claim, as it existed at the time of the location of the Nine Hour claim, with considerable unoccupied territory between the two locations, the position upon the ground occupied by the St. Louis claim was changed so as to include the unoccupied territory which theretofore intervened between the St. Louis claim and the Nine Hour claim, and also a portion of the Nine Hour location, being that for which the adverse suit was instituted. The plaintiff in error contended and contends that if the defendant in error should be permitted to go outside of or behind the patent issued for the St. Louis claim, or outside of or behind the deed made to the plaintiff in error by the defendant in error under the duress of the decree of the District Court of Lewis and Clark county, based upon the contract of compromise and adjustment, and to go back of the terms of that written contract, as was done in the introduction of evidence, the instructions to the jury at both trials in the Circuit Court, and by the Circuit Court of Appeals in reaching the conclusions upon which it decided that the defendant in error could assert extralateral rights to the ore contained within the compromise ground or 30-foot strip by virtue of an apex contained within that portion of the St. Louis claim which the defendant in error retained, then the plaintiff in error should have been permitted to add to the evidence in the record upon that fact the conclusive proof that the St. Louis claim, as to all the territory in conflict between it and the Nine Hour claim, and as to the unoccupied ground between

the two claims when the Nine Hour claim was located, was junior in location to the Nine Hour claim; that the territory in conflict between the two claims, and the respective assertions of title to which were adjusted by the give-and-take proposition embodied in the contract of compromise and which led to the decree and deed of conveyance, was greater in area than the compromise or 30-foot strip, and that if the plaintiff in error, as the owner of the Nine Hour claim, or its grantors, had proceeded with the adverse suit and succeeded therein, the Nine Hour claim would have included in its patented area the entire conflict, or 1.98 acres, within which lies, as disclosed in the evidence, all the apex of the Drumlummon vein upon which and by virtue of the ownership of which defendant in error asserted ownership in the ore and vein in question; that this might be proved as showing the circumstances surrounding the making of the contract and the nature of the property involved in the controversy and in the adjustment of the controversy, and that the express understanding of the parties, as well as the express terms of the contract, negatived the construction put upon the contract and the conveyance by the Circuit Court and the Circuit Court of Appeals through the importation into the case of assumed surrounding circumstances which plaintiff in error contends did not warrant this interpretation of the contract, and in fact did not exist, for the plaintiff in error sought to introduce evidence to prove that the understanding of the parties and the condition upon which the settlement was made were that the plaintiff in error should receive a conveyance of the ground called the 30-foot strip, including therein all the ore, mineral, lodes, and veins, whether the apex was within that territory or not, and that the added words, "together with all the mineral therein contained," were inserted to make sure of the accomplishment of this purpose. The plaintiff in error has contended though that if the courts could go or permit the jury to go beyond the unequivocal and unambiguous language of the

deed, then all the circumstances and facts surrounding and connected with the controversy and transaction were material and should be admitted in evidence in order that the purpose, construction, and interpretation of the deed should be made in the light of all and the real facts and circumstances and not in the supposed light of a part of the facts and of assumed facts which did not really exist.

ASSIGNMENT OF ERRORS.

The plaintiff in error will rely for a reversal of the judgment in this action upon the following assignments of error:

I.

The Court of Appeals for the Ninth Circuit erred in holding that it was bound by the opinions rendered by it and reported in the 102 Federal Reporter, page 430, and the 104 Federal Reporter, page 664, for that judgments which were rendered in pursuance of said opinions and which gave binding force to the same were vacated and set aside by the judgment of the said court rendered October 8, 1902.

II.

That there was error in said opinion and judgment so rendered, as aforesaid, in that it was held, upon the strength of the two former opinions in this cause, that the second amended and supplemental complaint, being the complaint upon which this action was tried, did state facts sufficient to constitute a cause of action and did not state facts showing that the plaintiff therein (the defendant in error here) had no cause of action.

III.

Error was likewise committed by said Court of Appeals in its opinion and judgment aforesaid in holding that the Cir-

cuit Court of the United States for the Ninth Circuit, District of Montana, did not commit error in permitting testimony to be given on the trial of said cause as to the existence of a discovery vein in the St. Louis Lode mining claim and as to the strike and dip of said vein, no allegations with reference to such vein or its dip or strike being made in the complaint or in anywise being in issue in said action.

That the said Circuit Court of Appeals erred in holding that the Circuit Court aforesaid did not commit error—

(*a*) In permitting the witness, William Mayger, to testify in answer to the following question:

"Q. Which direction does it run?"

To which question the plaintiff in error objected on the ground that the same was irrelevant and immaterial, for that the direction or strike of the discovery vein was not in issue, there being no allegation in the complaint relative to the strike or dip thereof.

(*b*) The Court of Appeals also erred in holding that the said Circuit Court did not err in permitting the said witness to testify that the St. Louis discovery vein ran very nearly parallel with the side lines of the St. Louis as staked; that it dipped to the east; that they had traced it to within 95 feet of the end line at the south end and within 400 feet of the north end.

(*c*) In holding that there was no error in permitting the witness, Walter Proctor Jenny, to testify as follows:

> "I have examined the discovery vein of the St. Louis Lode mining claim. Its course is substantially northeast and southwest. Explorations under ground show that it lies within 750 feet of the north end line and in the south end it is traced within 95 feet of the end line. The dip of the vein is from vertical to a dip of 85° to 90° easterly."

The plaintiff in error having objected to said testimony and to the question eliciting the same, for that the strike and dip of said discovery vein was not in issue.

(*d*) Error was likewise committed in permitting the witness, John R. Parks, to testify as follows, to-wit:

> "The discovery vein of the St. Louis is a gold-bearing fissure vein running in the general direction of the side lines; the vein is developed both northerly and southerly from the Transcontinental tunnel."

The said testimony and the questions in answer to which the same was given having been objected to by the plaintiff in error for the reasons aforesaid.

(*e*) The Court of Appeals also erred in holding that the Circuit Court did not err in permitting all of the other testimony shown in the record relative to the discovery vein of plaintiff's St. Louis mining claim and its strike and dip and permitting the same to be received in evidence over the objections of the plaintiff in error thereto.

IV.

The Court of Appeals likewise erred in holding in and by its decisions aforesaid that a mineral-bearing vein the apex of which enters and departs through the same side line of a mining claim has or can have extralateral rights under the mining laws of the United States.

V.

The Court of Appeals likewise erred in holding by its judgments and opinions aforesaid that the St. Louis Mining and Milling Company of Montana was not estopped by the bond for a deed given by its predecessor in interest, the judgment rendered against it by the District Court of the State of

Montana within and for the County of Lewis and Clark, wherein the said St. Louis lode is located, in the Specific Performance case, and by its deed made under and in pursuance of the decree rendered in that case, from claiming any right to mineral contained in the thirty-foot strip or compromise ground, and this without reference to whether the lode in which such mineral was found had its apex within or without the said thirty-foot strip or compromise ground; and it further erred in holding that the said defendant in error was not expressly enjoined and restrained from claiming any right, title, or interest in or to such mineral or any part or portion thereof.

VI.

The Court of Appeals aforesaid also erred in holding in and by its opinions and judgments aforesaid that the said defendant in error was entitled to pursue the Drumlummon vein on its dip downward between its so-called 108 and 133 foot planes; and it erred in holding that the Circuit Court for the District of Montana did not err in permitting the witness, William Mayger, to testify as to the ground which had been stoped out by the plaintiff in error northerly of its so-called 133-foot plane, and to point out to the jury on plaintiff's Exhibit No. 1 where he claimed such stoping to have been done.

(*a*) Error was committed by said Court of Appeals by holding that said Circuit Court did not err in permitting the said witness to answer the following question, to wit:

> "Q. Point out to the Jury, westerly of the 133-foot plane, where the stopes have been taken out?"

(*b*) And in permitting the said Mayger, over the objections of the plaintiff in error, to testify as follows, to wit:

> "The entire vein is stoped out between the 108 and the 133-foot planes from the surface to the 190-foot level of the Montana Company's works."

(c) In permitting the witness Parks to testify, over objection, as follows:

> "I have block No. 1, the stope south of the north line of the Montana Company's apex shaft to the 133-foot plane and from the surface to the instrument at 'K.' It lies entirely within the boundary of the compromise ground extended downward vertically. The block has an average width of seven feet, is 21 feet long and 36.3 feet high."

Also in holding that it was not error to receive the testimony of witnesses, as shown by the record, with reference to blocks 2, 3, 5, 6, and 7, all of which, as is shown by the testimony, lie wholly within the compromise ground and between plaintiff's so-called 108 and 133-foot planes; for that all of said testimony was objected to by plaintiff in error and was inadmissible, for the reason that the defendant in error did not have the whole of the apex of the Drumlummon vein within the surface boundaries of its claim beyond its so-called 108-foot plane, and that permitting it to pursue the vein between the two planes was a taking of the vein on its strike and was an unlawful interference with and an appropriation of 168 square feet of the surface of the compromise ground, property of the plaintiff in error.

VII.

The Court of Appeals erred in holding that the Circuit Court aforesaid did not err in sustaining objection to the following question asked of the witness, John H. Farmer, by plaintiff in error, to wit:

> "Q. Draw a line at right angles to that one (indicating the east line of the compromise ground) 50 feet from the center of the discovery shaft, on the Nine Hour where would it bring it on the map, that is, from the center of the discovery shaft on the Nine Hour and at right angles to the line between corners 2, and 3 of the St. Louis."

Said witness having testified that he was a mining engineer and had made the map (Defendant's Exhibit "E") about which he was testifying.

VIII.

The Court of Appeals erred in its holding that the Circuit Court did not err in refusing to permit the witnesses John Langan, William Robinson, Warren De Camp, F. P. Sterling, J. W. Eddy, and Joseph K. Toole, witnesses for plaintiff in error, to be called to the stand, and in requiring the defendant to submit to the court in an offer of proof, what it expected to establish by the testimony of each of said witnesses, severally.

IX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit the defendant to call to the witness stand John H. Farmer and to prove by him that he had read the complaint in the Adverse Claim suit brought by the owners of the Nine Hour against the St. Louis claim, which complaint is referred to in the complaint in the Specific Performance case; that he knew the description therein contained and that it represented an area of 1.98 acres; that he had platted the area in conflict on the map (Defendant's Exhibit "E"), and that it included the 30-foot strip or the compromise ground.

X.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objection made by plaintiff (defendant in error here) and in refusing to permit the defendant (plaintiff in error here) to prove by the witness, William Robinson, present in court, that he was the person who located the Nine Hour claim and the representa-

tive of his co-owner when the settlement of the adverse suit was made; that the whole area in conflict in that suit was 1.98 acres, the boundaries of which were accurately shown upon the map (Defendant's Exhibit "E"), and that all of the strip described in the bond was the easterly 30 feet of said 1.98 acres; that the instructions he received with reference to the settlement of said Adverse Claim suit from his co-owner De Camp, was that he was to retain the right to the ore beneath the compromise ground without regard to where the apex of the lode was in which said ore might be contained; that it was arranged with William Mayger, representing Charles Mayger, that the Nine Hour claimants were to have the 30-foot strip and "all of the mineral therein contained," without regard to where the apex of the lode might be in which such mineral was contained; that this was a distinct understanding of the parties before the bond (Defendant's Exhibit "A") attached to its answer was drawn up; that said bond was drawn up by Messrs. Toole & Toole, who were the attorneys for William Mayger; that the witness, after said bond was drawn up, went to Joseph K. Toole with said bond and inquired of him whether the obligor in said bond could pay the penal sum named therein and avoid making conveyance of the said premises, and whether by its terms the bond gave to witness and his co-owners all of the mineral contained in said compromise ground, regardless of where the lead in which it was found might have its apex; that he knew where the east side line of the St. Louis Lode mining claim was prior to the time that he staked his Nine Hour claim, and that the westerly line of the Nine Hour claim was not within 25 feet on the south end and 50 feet on the north end of said St. Louis east side line; that after his discovery the southeast corner stake of the St. Louis was moved up to a point near the east side line of his Nine Hour claim, which point is correctly shown on defendant's map (Exhibit "E"); that when the St. Louis was surveyed for patent such survey was started from its northeast corner stake and ran in the di-

rection of the stake which had been moved to the point marked corner No. 2 on its survey, where a monument was put up where no stake or monuments had ever stood before, from which point the said side line had an angle to its corner No. 3; that the extension of said east side line of said St. Louis claim over witness' Nine Hour claim was wrongful and resulted in securing as a part of said St. Louis mining claim all of the area of said Nine Hour claim embraced within said line save and except the 30-foot strip.

XI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit the defendant (plaintiff in error here) to call Warren De Camp and to establish by him that he was a co-owner in the Nine Hour claim at the time that the Adverse Claim suit was pending; that he knew the settlement that was made, and that he would not have consented thereto but for the fact that the owners of the Nine Hour were to have the 30-foot strip, together with all of its mineral contents, regardless of where the apex of the lode in which such mineral so found might be; that he knew of the wrongful extension of the east side line of the St. Louis over the Nine Hour, made at the time of the survey for patent of said claim; that he knew where the east line of the St. Louis was as originally staked, and the west line of the Nine Hour as that claim was staked, and that there was an interval of unclaimed territory between the two lines.

XII.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining plaintiff's objection to calling Frank P. Sterling, then in court, to the witness stand and in refusing to permit the said defendant (plaintiff in error here) to prove by said Sterling that at the time De-

fendant's Exhibit "A," attached to defendant's answer herein, was drawn he was a lawyer; was interested in said Nine Hour claim as a co-owner; that he understood the law of apex rights; that it was distinctly understood and agreed between the owners of the Nine Hour and of the owners of the St. Louis at the time said bond was made that the owners of the Nine Hour should own all of the mineral contained in said 30-foot strip or compromise ground, and that the owner or owners of the St. Louis should not have the right to follow into such ground any lead, lode, ledge, or vein having its apex within the surface boundaries of the St. Louis claim; that the witness, William Robinson, after said bond had been drawn up, took it to Governor Joseph K. Toole to learn whether it relieved the ground known as the compromise ground from the apex rights of the St. Louis claim adjoining it, and that he, said Robinson, would not accept said bond until he had been so assured of said fact.

XIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objection made by the plaintiff to defendant's offer to prove by the witness John W. Eddy that he was a co-owner in the Nine Hour claim at the time of the settlement of the adverse suit; that it was the distinct understanding between all of the parties to that settlement that the compromise ground was to be a piece of ground whose westerly line should be parallel to the lines of the St. Louis between corners numbered 2 and 3 and 50 feet distant from the center of the Nine Hour discovery shaft; that no settlement or agreement would have been entered into by the obligees named in the said bond but for the fact that the said obligees were to have all of the mineral contained in said ground, without regard to where the apex of the vein might be in which such minerals were found.

XIV.

The Court of Appeals erred in holding that the said Circuit Court did not err in sustaining the objections made by the plaintiff to the calling of John Langan, then in court, to the witness stand, and in sustaining its objection made to the offer of defendant to prove by said witness that he knew where the east line of the St. Louis claim was originally located, and where the west line of the Nine Hour was located, and that he knew that there was a vacant space of unclaimed ground between the two lines; that he knew that the easterly line of the St. Louis was wrongfully extended over the Nine Hour.

XV.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing, upon objection of plaintiff, to permit the defendant to call Joseph K. Toole and in rejecting its offer to prove by said witness that the bond for a deed (Defendant's Exhibit "A") attached to its answer was in his handwriting; that the words "together with all the mineral therein contained," were inserted therein because that was the agreement of the parties at the time said bond was drawn.

XVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to permit defendant to read in evidence the original complaint and the replication in case No. 2798, old series, of the records of the District Court of the Third Judicial District of the Territory of Montana within and for the County of Lewis and Clark, wherein William Robinson *et al.* were plaintiffs and Charles F. Mayger was defendant, being the Adverse Claim suit referred to in the record in the Specific Performance case, for the purpose of showing that the area involved was the 1.98 acres testified to as shown upon Defendant's Exhibit "E."

XVII.

The Court of Appeals erred in holding that the said Circuit Court did not err in overruling and denying defendant's motion to direct a verdict in its favor.

XVIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in telling them, in the preliminary portion thereof, that "defendant's answer then contains affirmative allegations which are not important in this trial and therefore no further reference is made thereto."

XIX.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge in giving to the jury its instruction numbered 5, which said instruction is as follows, to wit:

> "The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and the 133 foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

XX.

The Court of Appeals erred in holding that the said Circuit Court did not err in charging the jury as in its instruction No. 8, which said instruction is as follows, to wit:

"If you find that the course of strike of the discovery vein in the St. Louis mining claim, as disclosed at the point of discovery or elsewhere, is generally lengthwise of the location, the presumption arises that the discovery vein so located extends through the entire length of such location; and I further charge you that the burden is upon the defendant to overcome this presumption to your satisfaction. It is not necessary, in order to give plaintiff extralateral rights on that part of the Drumlummon vein which apexes within the surface boundaries of the St. Louis claim, between the 520 and the 133-foot planes, that the discovery vein of the St. Louis claim should pass through either end line of said claim, but it is sufficient to give such rights if the discovery vein, in its course or strike, passes through the ground within the St. Louis claim between said planes generally lengthwise of the claim."

XXI.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving its instruction No. 17, which is as follows, to wit:

"If, from the evidence before you, it appears to your satisfaction that since the commencement of this action and the service of summons upon the defendant, it has taken out and converted to its own use quartz, rock and ore, within the planes belonging to the plaintiff, under the instructions given you, then the acts of said defendant, to the extent of the said trespass, cannot be regarded as done without notice and knowledge of said plaintiff's title and claim. Under such circumstances, the trespasser may not be permitted to benefit by its trespass, and if, by reason of such trespass, it has placed the evidence within its control, or left it so that the extent of the injury to the plaintiff is uncertain, then it is your duty to see that the real owner and innocent party does not suffer from the trespass, and award to it such damages as will afford it just compensation for the injury it has sustained."

XXII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in its instruction No. 18, which said instruction is as follows, to wit:

> "The defendant, even if an innocent trespasser, is not entitled to claim any mitigation of damages for the moneys expended in the running of levels, sinking of shafts or development work, except to the extent actually necessary to the extraction of the ore in controversy. It is held liable under the law for the actual value of the ore, if the trespass was innocent, less the reasonable cost of extracting the ore, raising it to the surface, transporting it to the mill and reducing or milling it. Defendant cannot charge, in making the amount of these deductions, any extraordinary expenses to its plant, or any salaries paid to its officers, or any wages to any person, except to those actually employed and engaged in the extraction, transportation and milling of the ores in question."

XXIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving its instruction No 19, which is as follows, to wit:

> "When one has the apex of a vein within the surface boundaries of his mining claim, and is entitled to extralateral rights thereon, such vein belongs to such person, and the possession of such mining claim is possession of such vein in its downward course to its uttermost depth, and the entire vein is treated and considered under the law the same as though it, in its entirety, was wholly within the surface boundaries of said mining claim; and a trespass thereon by a third person is treated and considered the same as though it was a trespass upon said claim within its surface boundaries.
>
> "And, therefore, I instruct you, that in order to show good faith and honest intent in the trespass

and extraction herein complained of, the defendant must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass, had it been committed upon and within the surface boundaries of the St. Louis claim and the ore extracted therefrom."

XXIV.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving to the said jury its 20th instruction, which is as follows, to wit:

"If the jury believe from the evidence that it was in the power of the defendant to have kept a true and correct record of the amount of ore extracted by it between the 520 and the 133-foot planes, and the value thereof, and that it did not do so, but took away from the plaintiff the means of proving the true and correct amount and value thereof, the law will aid the remedy against the wrong-doer and supply the deficiency of proof caused by the misconduct of defendant, by making every reasonable intendment against him and in favor of the person whom it has injured. You are therefore instructed that if you find from the facts as above indicated, you are at liberty to follow the evidence given in behalf of plaintiff, as to the amount and value of the ore extracted, if you believe such evidence is worthy of credence."

XXV.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury in giving to said jury its 21st instruction, which is as follows, to wit:

"As to the evidence disclosed by the books of the defendant and the abstract thereof, offered in evidence in behalf of defendant, I charge you that to entitle them to be considered as sufficient evidence to prove the value of the ore extracted from the Drumlummon vein, you must be satisfied that the ores taken from

other parts of defendant's mine, which were mixed and intermingled with the ore taken from plaintiff's vein, if you find such to be the fact, were of approximately the same value therewith. The burden is upon the defendant to satisfy you upon this proposition."

XXVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in giving to the jury its 23d instruction, which is as follows, to wit:

"The law is well settled that if one wilfully places the property of another in a situation where it cannot be recovered, or its true amount of value ascertained, by mixing it with his own property, or in any other manner, he will be compelled to bear the inconvenience of the uncertainty or confusion which he has produced, by responding in damages for the highest value of which the property in question can be reasonably estimated."

XXVII.

The Court of Appeals erred in holding that the said Circuit Court did not err in its charge to the jury by giving to the jury its instruction No. 32, which is as follows, to wit:

"In considering any ore extracted from block 8, part of which was removed under the authority of this court some time ago, and to which defendant asserted claim of title, you are charged that if the defendant desired to have the value of the ores so removed deducted from the amount of any verdict which may be rendered, it should have introduced evidence to show that the ores were offered to or were left in the possession of the plaintiff, and of their value; and if the evidence fails to disclose such facts to your satisfaction, defendant is not entitled to have any deduction therefor; on the other hand, if such facts are so disclosed you should make a deduction in accordance with the general rules laid down in the charge."

XXVIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. 1:

> "The defendant having heretofore and on or about the 1st day of June, A. D. 1895, recovered a judgment and decree against the above-named plaintiff in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark, being the judgment and decree mentioned and set forth in the answer herein and in the evidence before you. And it not appearing from the testimony herein, that said judgment, in so far as it awards all of the mineral contained in the compromise ground to the defendant herein, has been, or was at any time modified, reversed or so restricted in its meaning as to apply only to such mineral as might be found in leads, lodes or ledges having their tops or apices entirely within the surface boundaries of said compromise ground; and, it appearing further, that in and by said judgment and decree, the plaintiff herein was forever barred from all interest or claim to said compromise ground, or to any part or portion thereof or to the possession thereof, or of the mineral or any thereof. You are instructed that such judgment and decree absolutely concludes the plaintiff as to any and all mineral contained in said compromise ground, whether the leads, lodes or veins wherein such mineral is found, have, or have not their apices within the surface boundaries of the plaintiff's St. Louis claim or otherwise, and as for all alleged trespasses in said compromise ground, you will not take the same into your consideration or return any verdict therefor.
>
> "The court instructs you that in order to entitle a miner to follow a vein or lode, having its top or apex within the surface boundaries of his claim, it is necessary that he should have the whole of such top or apex within his surface boundaries. In this case the plaintiff alleges that between what it denominates its 108 and 133-foot planes, it has only a part of the top or apex of the Drumlummon lode within its surface

boundaries. The court therefore instructs you that as between these two planes, the plaintiff would not have the right to follow this vein on its dip, and you will disregard all testimony relating to ores mined on the dip of the vein between these two planes mentioned and denominated the 108 and 133-foot planes."

XXIX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. II, which said instruction is as follows, to wit:

"It appearing that in and by the bond for a deed, a copy whereof is annexed to the defendant's answer herein, and by the judgment rendered on or about June 1st, 1895, in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark, in an action wherein the predecessor in interest of the defendant herein was plaintiff and the plaintiff herein was defendant, the plaintiff herein was precluded from asserting any right, title or interest in and to the compromise ground, or to any and all mineral therein contained, the said plaintiff had neither the actual nor constructive possession of the ground in which the trespasses complained of are alleged to have been committed and is therefore not entitled to recover in this action. You are therefore instructed to return a verdict for the defendant."

XXX.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XII, which said instruction is as follows, to wit:

"It is alleged in the answer in this case that a judgment was duly rendered and given on or about the 1st day of June, A. D. 1895, in an action then

pending in the District Court of the First Judicial District of the State of Montana within and for the County of Lewis and Clark, wherein the predecessor in interest of the defendant in this action was plaintiff and the plaintiff herein was defendant. Whereby, it is claimed, that all of the mineral contained in the thirty-foot strip was adjudged to be the property of the defendant in this action. It is admitted on the part of the plaintiff, by its replication filed in this action, that such judgment was rendered, but it is alleged that it was confined to such mineral and such mineral only, as was or is found in leads or lodes having their tops or apices wholly within the surface boundaries of the said compromise strip. The said judgment has been introduced in evidence, and there is no such limitation to it. The question of the ownership of the ores in the compromise ground was distinctly in issue in that case, as appeared by the pleadings, which are likewise in evidence before you, and the said judgment is therefore conclusive of the rights of the parties in this action. That judgment is a bar of the plaintiff's right to recover for any and all ores which you may find that the defendant has mined within the surface boundaries of the compromise ground extended downward vertically, and you will therefore dismiss the same from your consideration, and not include the value thereof in any verdict you may find for the plaintiff."

XXXI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XVI, which said instruction is as follows, to wit:

"The section of the Mineral Land Act which grants to the owner of a mining claim the right of extra-lateral pursuit of a vein having its top or apex within the surface boundaries of his own claim, expressly provides that nothing in this section shall authorize the locator or possessor of a vein or lode which ex-

tends in its downward course, beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another, and this provision is also contained in the patent for the St. Louis claim, introduced in evidence in this case. If you find from the evidence in this case that the plaintiff cannot enjoy the extralateral right on the Drumlummon vein, to the full extent claimed by it, without entering upon some part of the surface of the mining claim of the defendant, then to the extent of the surface upon which it would be obliged to enter, it would have no extralateral right, and in estimating plaintiff's damage, if any, you would be obliged to discard and lay aside damages for all ores mined by the defendant within the Drumlummon vein, and lying under that portion thereof which plaintiff could not work, or mine out, without entering upon the surface of defendant's ground."

XXXII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XIX, which said instruction is as follows, to wit:

"The burden of proof in this case is on the plaintiff, and unless you find from a preponderance of the testimony that it has established every material proposition, one of which is the course or direction of its discovery vein, then your verdict should be for the defendant."

XXXIII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXI, which said instruction is as follows, to wit:

"As I have already explained to you, plaintiff's extralateral right on the Drumlummon vein, where

the same is found within surface boundaries of its St. Louis claim, is limited and controlled by the extralateral rights which you may find from the testimony it has, or would be entitled to on its discovery vein, should that vein in its course, downward on its dip extend to and under the surface boundaries of the Nine Hour claim. The law does not contemplate that the owner of a mining claim shall have a greater length of vein beneath the surface than he has length of apex of the vein on the surface.

"For illustration, suppose that the plaintiff in the case, had only one hundred feet of the apex of its St. Louis claim within the surface boundaries of its claim, and that it was so situated, with reference to the Nine Hour claim, that on its dip downward and under the surface of that claim it would have extralateral rights; then it would only be entitled to one hundred feet in length along the course or strike of the vein in the Nine Hour claim.

"Applying these principles to the case at bar, the court instructs you that if you should find from a preponderance of the testimony that the vein in the sixty-five-foot shaft, which is plaintiff's discovery vein, does not extend through its St. Louis claim, but is cut off, or at best extends but a few feet beyond where it encounters the Transcontinental tunnel or fissure, then plaintiff's extralateral rights on the Drumlummon vein are controlled by the length of the discovery vein of the St. Louis claim and are practically coterminous therewith. To illustrate what I mean, suppose you should find that at the northerly end of the discovery vein of the St. Louis, it terminates practically at the end of the northeasterly drift driven by plaintiff from the bottom of its sixty-five-foot shaft, then you would be authorized to draw an imaginary line from said point to the Drumlummon vein, at right angles to the general course or strike of said Drumlummon vein, and this line or plane so drawn will mark the northerly limit of plaintiff's extralateral rights on the Drumlummon vein.

"Then should you further find, from a preponderance of the testimony that plaintiff's discovery vein

on its westerly course practically terminates at the Transcontinental tunnel or fissure, then a line drawn at right angles to the general course of the Drumlummon vein to such westerly point of termination of the St. Louis discovery vein will mark the termination of plaintiff's extralateral rights in said Drumlummon vein, no matter how much further to the southward the whole, or a part of the apex of the Drumlummon vein may be found within the St. Louis claim."

XXXIV.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXIII, which said instruction is as follows, to wit:

"If you should find from the testimony that the vein in the sixty-five-foot shaft is not the same vein as that shown in the drift to the southward from the Transcontinental tunnel, and that the vein found in the sixty-five-foot shaft passes through the fissure shown in the Transcontinental tunnel, and is found in the southerly side thereof as claimed by the defendant, then your verdict should be for the defendant, unless the plaintiff has satisfied you by a preponderance of the evidence that such vein continues on its course through its St. Louis claim, and passes out of the south end line of this claim, or practically does so. If you should find from the evidence that the fissure shown in the south side of the Transcontinental tunnel at a point a little westerly of the point where the vein from the sixty-five-foot shaft intersects said tunnel is the same fissure as that in which the vein in the sixty-five-foot drift is found, but that it only extends into the wall of the tunnel for a few feet and there terminates or dies out, then you would be entitled to regard the fissure in the Transcontinental tunnel as practically the southerly end of the plaintiff's said discovery vein, and your verdict should be for the defendant."

XXXV.

The Court of Appeals erred in holding that said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXVI, which said instruction is as follows, to wit:

> "The court instructs you that your first duty is to examine and ascertain what, if any, extralateral rights attach to the discovery vein of the plaintiff's St. Louis claim. In the first place you must ascertain which of the surface lines are, in law, the end lines of the claim. The lines of a mining claim are not necessarily the end lines and side lines of the claim as the locator has staked them on the ground, or named them in his notice of location. That is an end line which the vein on its strike crosses, and that is a side line which is practically parallel to the course of the discovery vein as it passes through the claim. For example, if you should find from the evidence that the discovery vein of the St. Louis claim was in what has been denominated the 65-foot shaft and that the vein therein discovered, on its course or strike through the claim, would pass out of the surface boundaries of the St. Louis, between corners numbered one and two thereof, and that following said course in a south-westerly direction, it would pass out of the westerly boundary of the said claim, then such lines would be, in law, the end lines of plaintiff's claim, and your duties in this case would terminate, when you had found that fact. This is so, because the plaintiff must satisfy you by a preponderance of the evidence, that the lode or vein which he first discovered and upon which he made his location, was substantially parallel to the easterly boundary line of his claim, before you would be justified in awarding him extralateral rights on the Drumlummon vein, or on so much of it as has its apex inside of the St. Louis boundary lines. If the vein originally located by plaintiff's predecessor in interest, Charles Mayger, on its strike would pass out of the St. Louis grounds to the easterly boundary thereof, then, in whatever direction it might dip, it

would not have extralateral rights within or under the Nine Hour claim, and extralateral rights could not be claimed for the Drumlummon vein in that territory. Mr. Mayger and his successor in interest, the plaintiff herein, would still be entitled to all the Drumlummon lode found within the surface boundaries, but they could not pursue it on its dip an inch beyond the easterly line of the St. Louis claim, extended downward vertically. The plaintiff's rights must be absolutely controlled by the location of the vein originally made by its predecessor in interest, Charles Mayger, and if he did not originally so locate his claim as to give him extralateral rights under the Nine Hour claim, it is plaintiff's misfortune, and one which neither this court nor this jury can correct. Mr. Mayger was the first locator. The ground was all open to him. The Nine Hour location had not then been made. He should have staked his claim along the strike of the vein, and not across it."

XXXVI.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXVIII, which said instruction is as follows, to wit:

"It conclusively appears by the testimony in this case, and it is an undisputed fact that the compromise ground or the 30-foot strip as it is sometimes designated, was originally entered as a part or portion of the St. Louis Quartz Lode mining claim. The court therefore instructs you that so far as the question of priority is concerned in this case, it is immaterial, and the plaintiff can predicate no right upon the proposition that its St. Louis claim was first located and first patented. Having been patented as a part of the St. Louis, the compromise ground is to be regarded as standing exactly on the same plane, so far as priority is concerned, with every part of the St. Louis claim."

XXXVII.

The Court of Appeals erred in holding that the said Circuit Court did not err in refusing to instruct the jury as requested by the defendant in its instruction No. XXXII, which said instruction is as follows, to wit:

> "Because the so-called compromise strip was patented as a part of the St. Louis Lode mining claim, and afterward deeded to the defendant company or its predecessor, I instruct you that the extralateral rights appertaining to this strip are equal in right with those appertaining to any other portion of the St. Louis claim, and that there can be no priority as between it and the balance of the ground embraced within the St. Louis patent to the westward of the west compromise line; and that the admission that the St. Louis claim was prior to the Nine Hour, does not involve any admission on the part of the defendant that the portion of the St. Louis claim outside of the compromise strip is prior in right or time to the said strip. In a case where there is equality and not priority of right, the grant must be construed most strongly against the grantor, and as the grantor, the plaintiff in this action, did not reserve in the deed any part of the apex, I instruct you that the right of the St. Louis Company to follow the vein to depth in this action must be limited by what is called the 108-foot plane, or the departure point of the hanging wall and that there can be no recovery in this case for any ores extracted south of the 108-foot plane."

XXXVIII.

The Court of Appeals erred in holding that the verdict in said case in the Circuit Court was not grossly excessive and apparently the result of passion or prejudice, and that the judgment rendered thereon and said verdict were not excessive and were supported by the evidence given in said

cause on the trial thereof, the said verdict and judgment being grossly excessive and unsupported by the testimony in said cause and contrary thereto.

XXXIX.

The Circuit Court of Appeals erred in holding that the defendant in error had a right under the terms of the deed from the defendant in error to the plaintiff in error of the compromise strip, and notwithstanding the grant therein contained, to the ores within said strip if and to the extent that the apex thereof was contained within that portion of the St. Louis claim retained by the defendant in error.

XL.

The Circuit Court of Appeals erred in holding that the surrounding circumstances alleged to exist, and by that court held to exist, and the nature of the property authorized a construction to be placed upon the deed of the 30-foot strip entitling the defendant in error to assert ownership in the ore within said conveyed premises by virtue of the existence of an apex of the lode in which it was contained within that portion of the ground patented as the St. Louis claim retained by the defendant in error.

XLI.

The Circuit Court of Appeals erred in holding that the portion of the St. Louis claim retained by the defendant in error was senior in location to the 30-foot strip conveyed by the defendant in error to the plaintiff in error and which was patented as a part of the St. Louis claim.

XLII.

The Circuit Court of Appeals erred in holding that, notwithstanding the issuance of the patent for the entire St.

Louis claim, including the 30-foot strip as a part of the St. Louis claim, and the conveyance thereof under said patent by the defendant in error to the plaintiff in error, the portion conveyed to the defendant in error could and should be treated as a part of the Nine Hour claim and later in location than the portion retained by the defendant in error, which was treated as a part of the St. Louis claim, and therefore as older in location than the 30-foot strip.

XLIII.

The Circuit Court of Appeals erred in refusing to hold that the federal statutes authorizing the patenting of lode mining claims, and under which the patent for the St. Louis Lode mining claim was issued, concluded the question of the date of location of all the territory embraced within the patent for said claim, and in refusing to hold that the court and jury and the defendant in error were precluded from asserting or so construing the said federal statutes, being Revised Statutes, sections 2325 and 2326, as to permit the investigation of the relative ages of different portions of the patented territory and to preclude the treatment of the different portions of the claim thus patented as parts of different locations and of different ages.

XLIV.

The Circuit Court of Appeals erred in refusing to hold that an investigation of the relative ages of the Nine Hour claim and the St. Louis claim was material, in view of the terms and provisions of the deed for the 30-foot strip.

XLV.

The Circuit Court of Appeals erred in not holding that all portions of the territory patented as the St. Louis claim were of the same age, and that the portion conveyed by the defendant in error to the plaintiff in error as the 30-foot strip

was of equal priority and had all the rights which it would have had as a part of the St. Louis Lode mining claim.

XLVI.

The Circuit Court of Appeals erred in holding, and in basing its decision upon the holding, that the 30-foot strip conveyed by the defendant in error to the plaintiff in error constituted the entire conflict between the Nine Hour and St. Louis claims, and that unless the defendant in error was permitted to assert apex rights to ore contained in the 30-foot strip by virtue of an apex within the portion of the St. Louis claim retained by it, the deed for this strip would convey more to the plaintiff in error than the plaintiff in error would have received had it patented, as a portion of the Nine Hour claim, the conflict between that claim and the St. Louis claim.

XLVII.

The Circuit Court of Appeals erred in holding that the territory in which the apex upon which the defendant in error relied in asserting title to the ores contained within the 30-foot strip was senior in location to the 30-foot strip.

XLVIII.

The Circuit Court of Appeals erred in holding that the defendant in error had or could assert extralateral rights by virtue of having a portion in width of the Drumlummon apex between the 108 and 133-foot planes.

POINTS AND AUTHORITIES ON ARGUMENT.

I.

JURISDICTION OF THE SUPREME COURT.

We contend that we are here on writ of error as of right. Section 6 of the act establishing circuit courts of appeal makes the decisions of those courts final "in all cases in which the jurisdiction is dependent *entirely* upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States." It further provides that "in all cases not hereinbefore in this section made final, there shall be OF RIGHT an appeal, or writ of error, or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed $1,000, besides costs."

The case at bar was commenced in the Circuit Court of the United States for the Ninth Circuit, District of Montana, on or about the 20th day of September, 1893, and the jurisdiction of the court was invoked by reason of the federal questions stated in the complaint. This is shown by the fact that Rawlinson T. Bayliss, Alexander Burrell, Isaac Warren, Joseph Harvey, Nicholas Francis, John Jewell, and Thomas Hawkins were made parties to the suit. Each of said personal defendants was at the date of the commencement of the action and the service upon him of the summons herein a resident of the town of Marysville, in the State of Montana, and a citizen of that State. (See return of marshal, Record, p. 7; testimony of Alex. Burrell, Record, p. 84.)

The original complaint (Supplemental Record) contains no allegation of diverse citizenship, nor any allegations as to the citizenship of the seven individual defendants, and from this it is plain that the defendant in error was not seeking to

invoke federal jurisdiction on account of diverse citizenship. There is an allegation that plaintiff is a corporation organized and existing under the laws of the State of Montana, and that the defendant in error is likewise a corporation organized under the laws of the Kingdom of Great Britain. This allegation was plainly made, we submit, not for the purpose of invoking jurisdiction, but of alleging the corporate existence and capacity of the plaintiff and defendant, and specifically does so. Strength is added to this conclusion by the fact that in the amended complaint thereafter filed, as well as in the second amended and supplemental complaint, upon which the case was twice tried, there is the same allegation of corporate existence and capacity, but no formal allegation of diverse citizenship. The defendant in error, from the commencement of this action up to the time it got into this court, relied for jurisdiction upon the fact that it was raising federal questions, and did not rely upon diverse citizenship.

The federal questions it was attempting to plead are clearly outlined in the original complaint, but are not so distinctly averred as they are in the amended and the second amended and supplemental complaints. There is no dispute, or doubt, or controversy over the proposition that the cause of action pleaded in the original complaint is identical with that set out in the second amended and supplemental complaint which appears in the record here. When an amended complaint has been made and sets forth the same cause of action as that set up in the original complaint, it is regarded as a continuation of the original pleading and takes effect as of the date when such original complaint was filed. In other words, it relates back to and supersedes the original complaint.

Heath vs. Whidden, 29 Me., 108.
Brockway vs. Thomas, 32 Ark., 311.
Schuyler Nat'l Bank vs. Bollong, 28 Neb., 684.
Clark vs. Delaware, etc., Canal Co., 11 R. I., 36.
Chattanooga, etc., R. Co. vs. Whiteside, 89 Ga., 190.

Where a judgment was reversed on appeal and a proper amendment filed after the case was remanded to the trial court, it was held to relate back to the commencement of the action.

Fleenor vs. Taggart, 116 Ind., 189.

Where, in an amended declaration, the citizenship of the parties is stated in the present tense, without stating such citizenship existed at the time of the commencement of the suit, it is sufficient, because the amended pleading will be held to relate back to that date.

Birdsall vs. Perigo, 5 Blatchf. (U. S.), 251.

In *Bowden et al. vs. Burnham et al.,* 59 Fed., 752, 754, it was said:

> "The objection to the jurisdiction of the court is grounded on the fact that the original petition did not disclose that the assignors of the claims which the plaintiff sued on as assignee were citizens of States other than Kansas, and the further fact that, rejecting those claims, the amount claimed by the plaintiffs was less than $2,000. But the court very properly granted the plaintiffs leave to amend their complaint (section 954, Rev. St. U. S.) and it was amended. Nevertheless, the plaintiff in error asserts that as the compaint, at the time the attachment was issued, did not contain the necessary jurisdictional averments, every step taken in the cause prior to the amendment was void, and that the amendment of the complaint could not impart vitality or validity to anything done before the amendment was made. This contention is wholly untenable. It is everyday practice to allow amendments of the character of those made in this case, and when they are made they have relation to the date of the filing of the complaint or the issuing of the writ or process amended. When a complaint is amended, it stands as though it had originally read as amended. The court in fact had jurisdiction of the cause from the beginning, but the complaint did not contain the requisite aver-

ments to show it. In other words, the amendment did not create or confer the jurisdiction; it only brought on the record a proper averment of a fact showing its existence from the commencement of the suit."

See also *Carnegie-Phipps & Co. vs. Hurlbut*, 70 Fed., 203-218.

The first federal question which we say is clearly defined in the second amended and supplemental complaint may be stated thus: When a vein enters and departs through the same boundary line of a mining claim, is such vein entitled to extralateral rights?

In this complaint the pleader describes a point where the vein enters the St. Louis claim, at which point he draws down an imaginary line parallel with what are claimed to be the end lines of the claim and which he denominates his 520-foot plane. The point where the said vein is alleged to enter is between corners Nos. 1 and 2 of the St. Louis Quartz Lode mining claim and 520 feet distant from corner No. 1. From this point the course of the vein and its departure is described as follows:

"Along the east side line of the said claim between corners Nos. 1 and 2, S. 21 deg. 15 min. west 512.7 feet to a point, being the intersection of the said east line of the said St. Louis Quartz Lode mining claim between corners Nos. 1 and 2 with the west line of the said 30-foot strip hereinbefore described; thence S. 59 deg. 50 min. west 108 feet and along the west line of the said 30-foot strip to a projected parallel end line of said St. Louis Quartz Lode mining claim extending vertically downward, which passes through the hanging wall of the said vein at the surface and at the crossing of the said hanging wall with the west line of the said 30-foot strip."

The second federal question distinctly defined in said second amended and supplemental complaint is couched in the following language:

> "That it is also the owner of, in possession, and entitled to the possession, of an additional portion of the said apex of said claim lying to the south of the southern point hereinbefore mentioned, a distance of 25 feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis Lode mining claim."

The first federal question arising upon this allegation may be concisely stated as follows: Where the apex of a wide vein crosses the boundary line of the claim at an acute angle, can the miner within whose surface boundaries the apex is found follow it extralaterally beyond the point where he has the whole of the apex within his surface boundaries?

Clearly stated in this last allegation are two other federal questions, as follows:

May a miner follow a vein departing through a boundary line of his claim at an acute angle on the strike as well as the dip of such vein? and

May a miner, under the provisions of the Mineral Lands Act, and because an apex of a claim departs across a boundary line of his claim at an acute angle, invade and take possession of a portion of an adjoining claim, in order to enable him to follow extralaterally a lead of which he has only a portion of the apex?

What is such federal question sufficient to confer jurisdiction upon this court is clearly defined in *Starin vs. New York*, 115 U. S., 257, as follows:

> "The character of a case is determined by the questions involved (*Osborn v. Bank of the United States*, 9 Wheat., 737, 824). If from the question it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a LAW of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not. Such is the effect of the decisions on this

subject (*Cohens v. Virginia*, 6 Wheat., 264, 379; *Osborn v. Bank of United States*, 9 Wheat., 737, 824; *The Mayor v. Cooper*, 6 Wall., 247, 252; *Gold Washing & Water Co. v. Keyes*, 96 U. S., 199, 201; *Tennessee v. Davis*, 100 U. S., 257, 264; *Railroad Co. v. Mississippi*, 102 U. S., 135, 140; *Ames v. Kansas*, 111, U. S., 449, 462; *Kansas Pacific v. Atchison R. Co.*, 112 U. S., 414, 416; *Provident Sav. Co. v. Ford*, 114 U. S., 635, 641; *Pacific Railroad Removal cases*, 115 U. S., 1, 11)."

This definition of a federal question is logical and concise and has been adopted and reaffirmed in—

Gibbs vs. Crandall, 122 U. S., 106.

Shreveport vs. Cole, 129 U. S., 41.
Richards vs. Rock Rapids, 31 Fed., 506.
Robinson vs. Anderson, 121 U. S., 524.

Upon the authority of this case it has been held that federal questions were involved in the following cases, namely, *Southern Pac. R. Co. vs. California*, 118 U. S., 112, the question being whether the State may tax a franchise of a corporation incorporated under an act of Congress; *Cook vs. Avery*, 147 U. S., 385, where the plaintiff's title rested upon the validity of a lien claimed under a federal judgment; *In re Lennon*, 166 U. S., 544, which was a bill to enforce compliance with the Interstate Commerce Act; and in *Cheesman vs. Shreve*, 37 Fed. Rep., 37, involving the right to enter beneath the surface of a mining claim, where depending upon the construction of a federal mining law. This definition has likewise been approved in the following cases:

Germania Ins. Co. vs. Wisconsin, 119 U. S., 476.
New Orleans vs. Benjamin, 153 U. S., 424.
Pratt vs. Paris Gas Co., 168 U. S., 259.
McKane vs. Des Moines, 174 U. S., 177.
Northern Pac. R. Co. vs. Soderburg, 188 U. S., 526.

In support of its contention that in this case jurisdiction depends upon the diverse citizenship of the parties, and that hence the decision of the Court of Appeals was final, the defendant in error, as respondent in No. 13, Original, cites three decisions rendered by this court, the first of which is *Amer. Sug. Ref. Co. vs. City of New Orleans*, 181 U. S., 277.

This was a petition to this court for writ of certiorari requiring the United States Court of Appeals for the Fifth Circuit to certify to this court, for its review and determination, this case, or, in the alternative, it prayed for writ of mandamus to command the judges of said court of appeals to hear, try, and adjudge said cause. The City of New Orleans had brought suit in the Civil District Court for the Parish of Orleans against the petitioner for the purpose of collecting a city license tax for the year 1899, alleged to be due under the laws of the State of Louisiana and an ordinance of the city of New Orleans, as an occupation tax for carrying on the business of refining sugar in that city. This cause was removed to the Circuit Court of the United States, the petition being based solely upon the ground that the defendant, the petitioner, was a corporation organized under the laws of New Jersey, and the plaintiff in the case below a municipal corporation organized under the laws of Louisiana.

It was not pretended that any federal question arose, either on the face of the complaint or elsewhere upon the record. A bare statement of this case shows that it is not in point here, because this action was commenced, not upon the ground of diverse citizenship, but because of a right of property asserted under the federal law and appearing upon the complaint. There was no allegation whatever, as already shown, of diverse citizenship.

It will be observed that the third syllabi seems to warrant the contention of the counsel on the other side. But, turning to the last paragraph of Mr. Chief Justice Fuller's opinion in the case, upon which this syllabi is based, it will be

seen at a glance that it is not warranted by that paragraph. That paragraph states the law beyond question, and nowhere in it is it intimated that when the determination of the question in dispute turns upon a law of the United States, the decision of the Court of Appeals is final.

The court first cites *Carter vs. Roberts*, 176 U. S., 496, which relates to the cases mentioned in section 5 of the Evarts act, by the terms of which a direct appeal lies to this court in six specified cases; and then it proceeds to qualify the observations contained therein by saying that where the jurisdiction of the circuit court depends on diverse citizenship and it turns out that the case involves the construction or application of the Constitution of the United States, or the constitutionality of a law of the United States, or the construction of a treaty, or where the constitution or a law of a State is claimed to be in contravention of the Constitution of the United States, the court of appeals may certify the question to this court or it may decide the whole case. In short, there is nothing in this part of the opinion, nor elsewhere in the case, that supports respondent's contention.

The next case so cited by counsel is that of—

Ayres vs. Polsdorfer, 187 U. S., 585.

This case, like that of *Amer. Sug. Ref. Co. vs. New Orleans, supra*, was a case of diverse citizenship, without any suggestion of any other ground of jurisdiction, either disclosed by the complaint or the record. It was a case of ejectment and trespass, brought originally in the Circuit Court of the United States for the Western District of Tennessee, for the recovery of lands and damages, the sole ground of jurisdiction being the diversity of citizenship of the parties. The plaintiffs were citizens of Indiana and the defendants were citizens of Tennessee.

The opinion contains a very full and accurate discussion of the right to a writ of error or appeal in cases of this character, but there is nothing in it applicable to the case at

bar; it does not even remotely support the contention of the respondent.

The last case cited by the counsel on the other side in the brief which they have filed in No. 13, Original, is that of *Empire State Idaho M. & D. Co. vs. Hanley*, 198 U. S., 292. Here, again, the federal jurisdiction depended solely and entirely upon diverse citizenship, and the pretense that there was any other ground of jurisdiction was found to be wholly without support. Hanley brought suit in the United States circuit court, claiming a third interest in the Skookum mining claim, under proceedings in the probate court, and an eighth interest in the same claim, which had come to him by mesne conveyance from the original owners. The circuit court, upon the trial of the case, held against him as to both of these interests. Hanley sued out a writ of error to the court of appeals, which held that he was not entitled to relief as to the third interest, but that he was as to the eighth interest. The decree was therefore reversed and the cause remanded for further proceedings (109 Fed. Rep., 712). The case then went back and was referred to a master for an accounting as to the eighth interest, who reported a considerable sum due Hanley. The circuit court upon the filing of the report reduced the amount found by the master by deducting therefrom the cost of working the property while Hanley was excluded from the mine, and entered a decree quieting Hanley's title to the eighth interest and giving him judgment for the reduced amount. Both parties appealed from so much of the judgment as was against them. Hanley's appeal was sustained (126 Fed. Rep., 97) and the case was remanded with direction to correct the decree in accordance with the opinion of the appellate court.

An appeal was sued out to this court, the appellants undertaking to bring themselves within the principle announced in *Spreckles Sugar Refining Co. vs. McLane*, 192 U. S., 397; *Nor. Pac. Ry. Co. vs. Soderberg*, 188 U. S., 526, and other

cases of that character, and for this purpose they contended that Hanley's original complaint, claiming a one-third interest, amounted to an assertion that he had been deprived of that interest by the probate court without due process of law, and therefore presented a federal question. The court, by Mr. Chief Justice Fuller, found against this contention, as follows (page 297):

> "What Hanley asserted was that his title to the one-third interest was good because he had purchased it from the administrator, under the decree of the probate court, and that the subsequent decree of that court annulling the prior decree was invalid for want of jurisdiction to render it at a subsequent term, for want of notice and for lack of evidence."

We need not stop to point out that each and every of these questions, as stated by Mr. Chief Justice Fuller from the record, were questions arising under the laws of the State of Idaho. For, as the opinion concisely states (page 298), "The decisions of the courts below did not turn on any federal question."

Under the clear and unambiguous language of sections 5 and 6 of the Evarts act, it would be a surprise to find any decision of this court, or of any court of appeals, which would sustain counsel's contention in this matter, and we feel more than warranted in saying that no such decision exists.

It is customary in pleading in actions to which corporations are parties, and is necessary as a matter of good pleading in many code States, that the corporate existence and the corporate capacity of these corporations shall be specifically alleged. The usual form of allegation is that the respective corporations are organized and exist under the laws of the jurisdiction in which they are created, and that they have capacity to do the things which it is indicated in the complaint or answer they claim the right to do or have done.

These allegations are contained in pleadings in the State courts where no question of federal jurisdiction arises.

California Steam Nav. Co. vs. Wright, 6 Cal., 258.

Esters Pleading, 4th ed., vol. 1, secs. 369, 370, 372, 373.

Bliss on Code Pleading, 2d ed., secs. 246, 249.

When, therefore, as in this case, the original complaint alleged the corporate existence and capacity of the plaintiff in error and defendant in error in the form and with the phraseology customary where a question of jurisdiction of the federal court did not exist, and such as is usual in cases in State courts, it would seem clear that it cannot be assumed or taken as intended by the pleader to rest the jurisdiction of the federal court upon diversity of citizenship; and when to this there is added the fact that there were seven individual defendants about whose citizenship no allegation whatever is made, it would seem to be conclusively established that no attempt was made to rest the jurisdiction of the court to any extent or at all upon diversity of citizenship. Certain it is that allegations of the character contained in the original complaint do not state diversity of citizenship or facts which would confer jurisdiction upon the Circuit Court on that ground.

Florida Central, etc., Railroad vs. Bell, 176 U. S., 321:

In this case this court held that an allegation in the complaint that three of the plaintiffs were citizens of Texas, without any allegation as to the citizenship of the five other plaintiffs, and with an allegation of the citizenship of the defendant, did not disclose an intention to rest the jurisdiction of the federal court upon diversity of citizenship. It further appeared in the complaint in that case, as in the original and the amended complaints in this case, that a claim was made by the plaintiff of a right which rested upon the grant of a

federal statute, and its existence was dependent upon a construction of such statute contended for by the plaintiff. Under these circumstances, at page 325, the court said of the complaint:

> "Does it disclose that the plaintiffs invoked the jurisdiction of that court *because* the parties were citizens of different States or because the case was alleged to be one arising under the Constitution, laws or treaties of the United States?"

And at page 326 it is further said:

> "Accordingly, it appears that the *theory* of the plaintiffs in bringing their suit in the Circuit Court of the United States was that the controversy was between a patentee of the United States and a railroad company claiming a right to occupy the land embraced in the patent by virtue of an act of Congress, and was therefore a case arising under the laws of the United States."

Again, the court says:

> "As then, the plaintiffs in the Circuit Court claimed in their declaration that the controversy was one that turned on the construction of the laws of the United States, and as both the courts below dealt with the case on that assumption, it is plain that it cannot be successfully contended in this court that the judgment of the Circuit Court of Appeals was final, because the jurisdiction of the Circuit Court was dependent entirely upon the opposite parties being citizens of different States."

Therefore, in determining whether jurisdiction depended entirely upon diversity of citizenship, this court held that the theory of the complainant, as evidenced by the failure to plead the citizenship of all the parties to the complaint, was controlling. Applying this principle to the original complaint, it will be at once seen that it was not the theory of

the complainant that jurisdiction existed because of diversity of citizenship.

It further appears in the case at bar by the complaint, as it did in the complaint in that case, that it was the definite purpose of the complainant to base the jurisdiction of the Circuit Court solely upon the existence of federal questions which are stated in the complaint, when its allegations are considered in connection with the plat attached to the complaint and made a part of it. The statute under consideration contemplated and provided that the basis of jurisdiction of the Circuit Court might be a federal question, or diversity of citizenship, or both federal question and diversity of citizenshop; so that three possible cases were covered by the provisions of the statute. There might be a case in which diversity of citizenship alone was alleged as the ground of jurisdiction, in which case jurisdiction depended "entirely" upon diversity of citizenship, and the decision of the Circuit Court of Appeals was made final. That is not this case. Again, federal questions might be presented by the complaint and these alone made the ground of federal jurisdiction. That was clearly the case upon the original complaint in the action at bar. Again, the complaint might allege diversity of citizenship and a federal question or questions as grounds of jurisdiction of the Circuit Court, in which case the fact that diversity of citizenship was alleged and was alleged as a ground of jurisdiction would not make the decision final, for jurisdiction would not depend entirely upon the diversity of citizenship. In short, the statute permitted and provided for a case in which the plaintiff might elect to base jurisdiction solely upon a diversity of citizenship or might instead base jurisdiction upon diversity of citizenship and federal questions or only upon federal questions. Only in one of these three classes of cases is the decision final. Neither by the terms of the original complaint nor by the terms of the first and second amended complaints was the jurisdiction made or attempted to be made to depend "entirely" upon

diversity of citizenship. In each of the three complaints federal questions were presented as grounds of jurisdiction, and in the first complaint this was the only ground presented. At the oral argument in "Original, No. 13," at this term, counsel for defendant in error admitted—indeed, expressly affirmed—that it was the purpose or intention and belief of counsel preparing the original complaint that it should and did state as the grounds of federal jurisdiction the existence of federal questions.

In *Northern Pacific Railroad Co. vs. Sodeburg*, 188 U. S., 526, the complaint disclosed that there was a diversity of citizenship between the plaintiff and defendant upon which federal jurisdiction could be based; but it also appeared from the complaint that the plaintiff claimed a right to the land in dispute, containing granite, upon the contention that land containing granite was not excepted from the grant to the plaintiff upon the theory that it was mineral land. This presented a federal question, and, clearly, but not more clearly than did the original complaint herein, disclosed that it was the theory and purpose of the complaint to present this federal question as a basis of federal jurisdiction. While in that complaint the contention or interpretation of the statute by the defendant was set up, this could not and did not confer jurisdiction, for that depended upon the allegations of the complaint and not upon a statement of the defense or contentions of the defendant.

In the case last cited, a motion was made to dismiss the appeal in this court upon the ground that the decision of the Circuit Court of Appeals was final, since the jurisdiction of the Circuit Court had been based upon diverse citizenship. This court said:

> "But to impress the attribute of finality upon a judgment of the Circuit Court of Appeals it must appear that the original jurisdiction of the Circuit Court was dependent 'entirely' upon the diverse citizenship. That is not the case here. Plaintiff's bill does indeed set up a diversity of citizenship as one

> ground of jurisdiction, *but as it appears that its title rests upon a proper interpretation* of the land grant act of 1864 as to the exception of non-mineral land, *there is another ground,* wholly independent of citizenship, under that clause of section 1 of the act of 1888 (25 Stats., 433) clothing the Circuit Court with jurisdiction of all civil suits involving over two thousand dollars 'and arising under the Constitution or laws of the United States.' "

This decision expressly recognizes that there may be two grounds of jurisdiction—one diversity of citizenship and the other a federal question—and that in such case there is a right to a writ of error from the Circuit Court of Appeals to this court. The case is in important aspects parallel to the one under consideration. It appears from the complaint in the case now here that the title of the defendant in error rests upon a proper interpretation of the Mineral Lands Act of May 10, 1872, as to the exception of ore contained in a vein apexing outside of the portion of the claim conveyed and crossing twice the same side line, and in addition thereto upon a right to follow a vein upon its dip when but a portion of the width of its apex is within the territory of the plaintiff; which grounds of jurisdiction are wholly independent of citizenship and depend upon whether the construction which this asserted right puts upon the federal mining statutes may be enforced.

These questions were not merely put forward for the purpose of simulating grounds for jurisdiction, but they were in fact *bona fide*, vital, and controlling questions in the case as to the rights of defendant in error. As the second amended and supplemental complaint stood, the defendant in error undertook to assert apex rights against its own conveyance, against territory patented under the same grant of the Government as that in which the apex upon which it relied was contained, against its own grant, and also undertook to assert apex rights by virtue of having a portion of the width of the apex within its claim. These contentions

made it necessary to pass upon and construe the meaning of the federal statute, as we elsewhere more particularly point out, and upon the interpretation of the statute depended the existence of the right of the complainants. These questions were passed upon by the Circuit Court at the first trial, with the result that Judge Knowles sustained the contention of the defendant in error upon the one claim and held against it upon the other; while the Circuit Court of Appeals held for the defendant in error upon both contentions, and in so doing discussed and construed the federal statutes and made a decision upon subjects and questions which had never been determined by this court and which have not yet been so determined.

Judge Morrow (104 Fed., 664, 667) says in this case:

> "When a secondary or accidental vein crosses a common side line between two mining locations at an angle and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong? This question does not appear to have ever been directly passed upon by the courts."

And again, on the same page, it is said:

> "The second contention of the defendant in error involves the construction of section 2322 of the Revised Statutes. That section provides: 'the locator of a mining location * * * shall have the exclusive right to possess and enjoy * * * all veins, lodes, and ledges throughout their entire depth the top or apex of which lies inside of such surface lines extended down vertically.' The plaintiff in error maintains that the words 'top or apex' cannot be construed to mean 'top or apex or any part thereof,' and that under the strict construction necessary extralateral rights would not follow when the whole of the apex was not within the surface lines."

The dissenting opinion of Judge Ross (104 Fed., 669) emphasizes the importance and existence of one of these important federal questions, to wit, the right to follow upon its dip a vein when the apex enters and departs from a side line only of a mining claim. The complaint disclosed the existence of these two important federal questions, which had never been determined by this court and have not now been determined, and upon which the complainant rested the jurisdiction of the Circuit Court.

To repeat, those questions were: (1) Whether extralateral rights were possessed by virtue of the ownership of the apex of a vein which entered and passed out of the same side line of the mining claim, and when that side line was a broken line and the apex entered through one portion thereof and passed out through the other; (2) Whether extralateral rights existed by virtue of the ownership of a portion of the width of an apex.

These federal questions are in the original complaint, in the first amended complaint, and in the second amended and supplemental complaint; so that, at all times from the institution of the action down to the last step taken in the trial thereof, the jurisdiction of the Circuit Court was rested, intentionally and solely, upon federal questions.

We here present only the evidences of the existence of these questions, of their having been at all times the grounds for federal jurisdiction. Later in this brief, and under the proper headings, we present the authorities and the arguments upon which we contend that the construction of the federal statute claimed and relied upon by the defendant in error was erroneous; that the opposite thereof, contended for and relied upon by the plaintiff in error, was correct, and that the Circuit Court of Appeals erred in affirming the adoption by the Circuit Court in the one instance of the erroneous contention of the defendant in error and in reversing the action of the Circuit Court in the first trial in adopting the correct construction of the plaintiff in error.

We respectfully submit that we are in this court as of right, and that the questions to be adjudicated in this case are all strictly within the definition of a federal question as given by Chief Justice Waite in *Starin vs. N. Y., supra.*

II.

THE LAW OF THE CASE.

Assignment of Error No. I.

Our first assignment of error is addressed to what we believe was error in the Circuit Court for the District of Montana and in the Circuit Court of Appeals in holding that they were bound by the opinions rendered in this case in 102 Fed., 130, and 104 Fed., 664.

While it is true that the Circuit Court did not base its rulings upon the proposition that these opinions were expressly "the law of the case" (Record, p. 23; side p. 46), yet it followed them faithfully and explicitly throughout the trial on all questions of law and of fact referred to therein. Indeed, it followed the doctrine more conclusively than it would have been justified in doing even if these opinions were clearly and undeniably "the law of the case," in that it refused to admit competent testimony for the establishment of new facts material to the issues, which was offered by the defendant and rejected by the court because such testimony had not been offered on the former trial and therefore did not appear in the opinions referred to.

In the Court of Appeals, its refusal to consider the questions which were raised in the record and argued was based broadly upon the proposition that the two former decisions were "the law of the case." After reciting the history of the case on the two former writs of error to that court and the decisions of this honorable court and the judgment rendered in the court below October 8, 1902, the court says:

> "There is certainly nothing in this judgment to indicate a purpose on the part of the court to set aside its decisions rendered in the case. On the contrary, the fact that these decisions were not withdrawn or recalled and the case set at large indicates that the court has no intention of doing so. The decisions were allowed to stand as the opinions of this court upon the issues presented by the writs of error, and hence, became the law of the case. The fact that the mandate does not contain a reference to these opinions does not determine that they are without authority" (Record, pp. 154, 155).

It is to be remembered in this connection that after the case, on two writs of error, was returned to the Court of Appeals by this court, the case came on to be heard before the Circuit Court of Appeals on the transcript and on the petition of The Montana Mining Company, Limited, for the issuance of a single mandate in the cause, and the court, after reciting the entry of the judgment reported in 102 Federal, and the judgment reported in 104 Federal, and the receipt of mandates from this court, rendered another judgment, as follows, to wit:

> "It is now ordered and adjudged that the judgment so heretofore made and entered herein BE VACATED AND SET ASIDE, and that in lieu thereof it is ordered and adjudged that the judgment of said Circuit Court in this cause be and the same is hereby reversed, with costs, and the cause is remanded to said Circuit Court for a new trial."

Accordingly the said cause, on or about the 31st day of October, 1902, was remanded to the Circuit Court for a new trial, as "according to right and justice and the laws of the United States ought to be had, the said judgment of the said Circuit Court notwithstanding."

Our contention is that this action of the Court of Appeals

relieved the cause of the doctrine of "the law of the case" and set it at large. While this question is not a very important one in this court, so far as this case is concerned, it is an important one in practice. The rule that an adjudication by an appellate tribunal becomes the law of the particular case on all subsequent trials is a wholesome one and one which should be enforced; yet we think it should be confined to cases which fall exactly within the conditions where it has been hitherto enforced.

A very able and exhaustive discussion of the growth and application of this doctrine is found in the *City of Hastings vs. Foxworthy*, 45 Neb., 67.

Our contention, distinctly stated, is that when the Court of Appeals set aside the two judgments and remanded the case for a new trial, without instruction, to the trial court, it thereby set the case at large, and neither the Circuit Court nor the Circuit Court of Appeals was bound by the opinions.

2 *Black on Judgments*, sec. 511.

1 *Wharton on Ev.*, sec. 781.

French vs. Edwards, 4 Savg., 125.

> "On the reversal of a judgment at law, therefore, the theory of the law is that the parties are in *statu quo*, and are to be considered as if the judgment had never been rendered."
>
> *Tarleton vs. Goldthwaite's Heirs*, 58 Am. Dec., 296, 298.
>
> *MacJilton vs. Love*, 54 Am. Dec., 449.
>
> *Stearns vs. Aguirra*, 7 Cal., 443.
>
> *Phelan vs. San Francisco*, 9 Cal., 15.
>
> *Argenti vs. San Francisco*, 30 Cal., 463.
>
> *Heidt vs. Miner*, 113 Cal., 385.

> "When the decree was reversed and the case remanded generally without any specific directions to the lower court, that court was not required to proceed according to the opinion of the appellate court,

but it had authority to permit a change in the pleadings and to hear the cause *de novo.*"

Lang vs. Metzger, 69 N. E., 493, 497; citing—
Chickering vs. Failes, 29 Ill., 294.
Parker vs. Shannon, 121 Ill., 452.
Perry vs. Burton, 18 N. E., 653.
Cable vs. Ellis, 11 N. E., 188.
West vs. Douglas, 34 N. E., 141.
Russell vs. Rush, 48 N. E., 990.

"On a former trial of this case on appeal, reported in 5 Col., 341, the opinion reversing the case holds the law different from what we have laid down, and we cannot and will not assent to the view therein expressed. The doctrine of a former adjudication can have no application to this case, as it was a simple reversal of the judgment of the court below for reasons therein stated; but no judgment was given for one party or the other, except that of reversal, and what the law fixed as a consequence, the costs of court. The judgment of reversal is conclusive that the case was reversed, but of nothing more."

Bynum vs. Apperson, 9 Heisk. (Tenn.), 623-644.

We respectfully submit that this case falls exactly within the rule laid down in the case just cited. The judgment of the Court of Appeals of October 8, 1902, was simply a judgment of reversal and the case remanded for a new trial. Nothing was definitely settled by this judgment between the parties.

In speaking of the character of an opinion which will give rise to the doctrine of "the law of the case," the Supreme Court of Maryland says:

"But to give the binding decision these conclusive qualities, it ought to be explicitly declared and perfectly understood, and, to become 'the law of the case,' it ought definitely to settle the rights of the litigant parties."

Hammond's Lessee vs. Inloes, 4 Md., 138, 167.

"But if this is the same case as that formerly before the court, it is a misnomer to call the opinion and a simple judgment of remand for a new trial *res adjudicata*. The opinion delivered may properly control the lower court, and ordinarily should do so, and would undoubtedly, on the same facts, be entitled to great weight on a second appeal to this court. But the opinion or reasoning for the judgment is no part of it, and the judgment itself is not final between the parties, and therefore is not conclusive."

White vs. Downs, 40 Tex., 227.

"Where the Court of Appeals reverses a decree and remands the cause without directions, such order is not *res adjudicata* on retrial of the same cause in the county court."

Friedman vs. Lesher, 64 N. E., 736; citing—
Linington vs. Strong, 11 Ill., 152.
Henning vs. Aldridge, 156 Ill., 305; 33 N. E., 754.
Board vs. Nelson, 44 N. E., 743.

We have examined many authorities which discuss the question of "the law of the case," and have not been able to find a single case where that doctrine has been held applicable after the judgment which gave it force and validity had been set aside, either by the court which originally rendered the judgment or by an appellate court to which the case was carried. We do not think that the Court of Appeals has been more successful in this respect than we have been.

In *Browder vs. McArthur*, 7 Wheat., 58, there had been a decree which was remitted to the court below to be carried into effect according to its mandate. A subsequent appeal was taken from the Circuit Court for supposed error in carrying into effect the mandate, and it was held that this appeal did not authorize an inquiry into the merits of the original decree. The decree stood there unrevoked, in full force and effect, and definitively settled the rights of the parties. In other words, it became and was "the law of the case" in the fullest sense of that term. And in each case cited by the

court in support of its application of this doctrine to the case at bar it will be found that the opinion which was thus enforced rested upon a valid subsisting judgment, which had not been revoked, reversed, modified, or set aside in the court in which it was rendered or by any appellate tribunal.

We submit that the case at bar ought not to be an exception to this unbroken line of authorities.

This case discloses that the Circuit Court of Appeals dealt with and this court is called upon to determine a number of important questions relating to the meaning, force, and application of the Mineral Lands Act of May 10, 1872. The Circuit Court of Appeals, in the two decisions made by it in 102 Fed., 430, and 104 Fed., 664, passed upon these questions, and yet its decisions and determinations thereon were not and could not be a final adjudication and determination of the law upon that subject. The Circuit Court of Appeals, whatever may have been the ground upon which the Circuit Court obtained jurisdiction of the case, is, as to these questions, an intermediate appellate court. Ultimately these matters, in their very nature, must come to this court, through some channel, for final determination. Whether the existence of a portion in width of an apex within a claim gives to or confers upon the owner of that claim extralateral rights, as is contended in this case and so decided by the Circuit Court of Appeals, cannot be put at rest by the adjudications of circuit courts or circuit courts of appeal, and must come to this court for adjudication in order that the last word may be said upon that subject and an interpretation put upon the statute covering this question which is not open to further debate or litigation. Until that determination is made, we may have, and in fact do have, upon this question warring and conflicting decisions by courts of coördinate jurisdiction.

It appears from decisions which have been called to the court's attention in this brief that in the eighth circuit, especially in Colorado, it has uniformly been held by the fed-

eral court that, in order that extralateral rights may be asserted, the apex—all the apex—must be within the claim making that assertion. It is now adjudicated by the Circuit Court of Appeals of the Ninth Circuit that this is not the law, in the opinion of that court. In a case in the Circuit Court of Appeals for the Eighth Circuit, where no controversy or debate between the litigants in that case upon this subject was presented, this was assumed to be the law; but up to the present time that question has not been argued in this court, and has not been considered or determined by this court. Its importance cannot be exaggerated. The necessity for its determination in this and similar cases is manifest.

The same statements may be accurately made with reference to the case of a vein passing in and out of a claim through the same side line, especially where that side line is a broken line, and whether the vein thus passing through the same side line be the discovery or what is called a collateral vein, for the existence of extralateral rights under these conditions has not yet been affirmed or denied by a decision of this court.

The question was fairly presented, discussed, and necessarily determined in this litigation.

The Circuit Court of Appeals further held that when mining territory had been patented under and as a part of a given lode location, notwithstanding the conclusive character of patent proceedings and of the issuance of patent as to the title of the claim, the fact that there had been a conflict between two locations as to which owned the territory in dispute would enable a court to so construe the federal mining statutes as to permit the court to disregard the fact that all this territory was patented as one location, and in an apex controversy treat a part of it as of one date of location and another part as of another date of location. This is an important question, one apt to arise at any time where there have been compromises and settlements of the character existing in this litigation. It was an important question before

the Circuit Court and the Circuit Court of Appeals. It was contrary to the contentions and made most significant and controlling in arriving at the result reached by the Circuit Court of Appeals. That question has never been determined by this court, and must, before it is finally settled, be so determined.

There are other questions to which, for the purposes of this argument, it is needless to refer, federal in their character, important in their nature, undetermined as yet finally by the decisions of this court.

Under these circumstances, to treat as finally determined and put beyond further investigation or review by this court these questions is to disregard the plainly manifest and logical condition prevailing, which renders all decisions of the appellate courts upon such questions tentative in their nature and requiring for their conclusive settlement a decision of this court.

It has been held upon sound reasoning and salutary principles that the decisions of an intermediate appellate court are not *res adjudicata* in the case itself, nor the law of the case, when further action is taken therein. In *Calhoun Gold Mining Company vs. Ajax Gold Mining Company*, 27 Colo., 9, it was said:

> "It is contended by counsel for appellee that the ruling in Branagan *v.* Dulaney, and cases following it, is wrong, and that this question should now be considered. In opposition to a reconsideration of the rights of cross-lode claimants, as declared by those cases, it is urged that the doctrine of *stare decisis* applies, and even if wrong should not now be disturbed, because the rule therein announced has been established for such great length of time as to become a settled rule of property in this State. We are aware of the gravity of reversing a long established precedent, and realize that it should not be disturbed except for the most cogent reasons; that the people of this Commonwealth have a right to presume that when a question has been once settled by this court, that its

> decision is correct and that all may rely upon it. We understand generally that when a decision has established a settled rule of property upon which rights are predicated (and especially those relating to real estate) the law will be adhered to by the court announcing it, and those bound to follow its adjudications, even if erroneous (Black on Interpretation of Laws, sec. 152), but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon the ground that a previous erroneous decision has been rendered on a given question. If it is wrong, it should not be continued, unless it has been so long the rule of action, and relied upon to such an extent, that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it. Black on Interpretation of Laws, *supra;* Sutherland's Stat. Constr., sec. 316; Boon *v.* Bowers, 30 Miss., 246."

And that court therefore, and because the decisions relied upon were based upon interpretations of Federal statutes and the final determination thereof must be made by the Supreme Court of the United States, reversed the former decision of the Supreme Court of Colorado, and was, in the results which it reached, affirmed by this court.

Calhoun Co. vs. Ajax Co., 182 U. S., 499.

In *Brown vs. Tourtelotte,* 24 Colo., 244, the Supreme Court of Colorado held, as correctly stated in the syllabus to that case, that—

> "1. LAW OF THE CASE.—A decision by the Court of Appeals in a case the final decision of which may ultimately rest with the Supreme Court, does not constitute the law of the case, although it may not have been reviewable in the first instance upon appeal or writ of error.
>
> "2. SAME.—The doctrine that the law of the case as announced by an appellate court is conclusive in subsequent proceedings, does not apply to the decisions of intermediate courts, but only to appellate tribunals which are also courts of the last resort."

The Court of Appeals of Colorado is an intermediate appellate court as to some matters and a court of final jurisdiction as to others.

In *Davidson vs. La Plata County,* 26 Colo., 552, the Supreme Court of Colorado said:

> "The decision of the Court of Appeals is not *res adjudicata.* It has been held by this court, in the case of Brown *v.* Tourtelotte, 24 Colo., 204, that the doctrine of the law of the case does not apply to decisions of the Court of Appeals in cases where their final determination may ultimately rest with the Supreme Court."

The logic of these decisions, we submit, is impregnable. Upon what ground may it be claimed that the decision of an intermediate appellate court, which does not make the law upon that subject, does not ascertain or authoritatively and conclusively settle it, shall be taken as the law of the case when that particular question may reach and must finally be determined by another appellate court?

III.

THE COMPLAINT DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AND STATES FACTS SHOWING THAT THE PLAINTIFF HAS NO CAUSE OF ACTION.

Assignment of Error No. II.

In our statement of the case we have called attention to the fact that the amended and supplemental complaint, after setting forth the boundaries of the St. Louis claim in accordance with the calls of its patent, and after claiming ownership of "all veins, lodes, and ledges of mineral-bearing rock through their entire depth, the tops or apexes of which lie within the surface lines of the said *fractional* portion of

said St. Louis Lode mining claim," makes the following exception:

> "Save and except that portion thereof known as the 30-foot strip, or compromise ground, which belongs to and is a part and portion of what is known and designated as the Nine Hour Lode mining claim, which said fractional portion of said St. Louis mining claim is described as follows, to wit:"

Here follows a description of the compromise ground by metes and bounds, as the same is described in the bond for a deed (Defendant's Exhibit A, attached to its answer); then closes as follows:

> "Including an area of about 12,844.50 square feet, TOGETHER WITH ALL MINERAL CONTAINED THEREIN."

The next paragraph of this complaint alleges:

> "That the said defendant, Montana Mining Company, Limited, is and was the owner of what is known and designated the Nine Hour Quartz Lode mining claim, situated and being east of the said St. Louis Lode mining claim, and including the 30-foot strip, or compromise ground aforesaid."

Can the English language express anything more clearly and plainly than this? Here is an allegation that the defendant in error is the owner of the St. Louis Lode mining claim, with all the veins, leads, lodes, and ledges having their tops or apexes within the surface boundaries of the claim, save and except the compromise ground, together with all the mineral therein contained; and, not to leave the ownership of this piece of ground in doubt, it avers that the plaintiff in error here is the owner of it. It seems incomprehensible to us that there should be standing on the records of the Circuit Court of the Ninth Circuit for the District of Montana a judgment against us in the sum of $195,000, in favor of the defendant in error, recovered upon a complaint

in which it is distinctly alleged that the compromise ground is our ground, together with all of the mineral therein contained. True, this admission is followed by the allegation of paragraph 4, which is as follows, to wit:

> "That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the St. Louis mining claim, is to the east and dips under and beneath the said Nine Hour Lode mining claim, including the said 30-foot strip, or compromise ground, which is a part and portion of the Nine Hour Quartz Lode mining claim, which said portion of said vein has its top or apex within the said St. Louis mining claim as follows, to wit:"
>
> Record, p. 4.

Then follows a description by courses and distances of the strike of the vein through the St. Louis surface boundaries and the point where it departs therefrom.

Next follows this allegation:

> "That it is also the owner of, in possession, and entitled to the possession of an additional portion of the said apex of said claim lying to the southern point hereinbefore mentioned, a distance of 25 feet, whereat the foot wall of the said vein passes out of the east side line of the said St. Louis mining claim."

Reference is then made to a map attached to the complaint, and paragraph 5 follows. We quote:

> "That notwithstanding the right of the said plaintiff in the premises, said defendant, on or about the 30th day of June, 1893, knowingly, wrongfully and unlawfully, by means of drifts, shafts, tunnels and underground workings, entered into and upon that portion of the vein, lode or lead so apexing within the said St. Louis mining claim, and commenced extracting quartz rock and ore therefrom, and removing the same and converting it to its own use and

> benefit, and they are now still removing and converting the same, which said quartz rock and ore is of the value of $200,000; on account thereof this plaintiff has been damaged in said sum.
>
> Record, pp. 4, 5.

Then follows the supplemental part, wherein it was originally alleged that the damage up to the 26th day of June, 1899, was $50,000, and which was amended on the trial so as to change the $50,000 to $400,000.

We have thus carefully set out these portions of this pleading for the purpose of calling the court's especial attention to the fact that at the close of paragraph 2 of the complaint and at the beginning of paragraph 3 there is, first, an express disclaimer of ownership of the compromise ground or of any of its mineral contents, and, second, an averment that plaintiff in error is the owner of that strip of ground. Now, we say that neither in paragraph 4 nor paragraph 5, nor anywhere else in the complaint, is there any allegation conflicting with this admission of ownership of this ground and its mineral contents in the plaintiff in error.

Let us still more distinctly state this. This complaint alleges that the plaintiff in error is the owner of the compromise ground and the mineral therein contained, and there is nowhere within the four corners of the complaint any claim on the part of the defendant in error that it owns or has any interest whatever in the compromise ground or in any of the mineral therein. Therefore we say that it does not state facts sufficient to show a cause of action on behalf of the plaintiff therein and does show that it has no cause of action. Will this court, or ought any court, go beyond the pleading and say that a plantiff has a cause of action, notwithstanding the fact that he has not set it up or claimed it in his complaint? So far as stating a cause of action in the plaintiff is concerned, this complaint is of no more value than so much blank paper.

Let us look at a few of the fundamental rules governing the construction of pleadings.

> "Every part of a pleading must be adopted in construing it."
> 4 *Encyc. Pl. & Pr.*, p. 746.

> "In interpreting the language of a pleading, the words must be construed according to their popular sense; they must receive their ordinary and usual signification when taken in every relation to the subject-matter with which they are used."
> *Ibid.*, 748.

> "In the construction of a pleading nothing will be assumed in favor of the pleader which has not been averred, as the law does not presume that a party's pleadings are less strong than the facts of the case will warrant."
> *Ibid.*, 746.

Cogswell vs. Bull, 39 Calif., 320, 325, was an action against a board of directors of a corporation to compel the performance of a corporate duty, and no demand had been made upon the board to bring the action. The reason given in the complaint for the omission to make a proper demand was "that the board of directors who now manage and control the affairs of said corporation is *nearly*, if not entirely, composed of the same men who composed the board of directors of said corporation during the time hereinbefore mentioned." The court said:

> "This is bad pleading and lacks the precision which is requisite in an allegation of fact."

In *Smith vs. Buttner*, 90 Cal., 95, a house had been raised six or seven feet in height, and the wife of the plaintiff had been injured by a fall in attempting to get out of the house. The complaint did not allege that the fall and injury were in anywise due to the negligence of the

defendant. In other words, the negligence was well pleaded, but that it was the cause of the injury was not pleaded. The court held that the complaint did not show facts sufficient to constitute a cause of action.

In *Hoag vs. Warden*, 37 Cal., 522, the complaint alleged the collection of money by a sheriff and his failure to return the execution, but it did not allege that he had failed to pay the money over to the plaintiff. The court said:

> "We cannot assume that it has not been paid without any averment on the point."

In *Chamberlain vs. Blair*, 58 Ill., 385, it is said:

> "The court cannot incorporate any material into the plea which the pleader has omitted by accident or design."

In *Griswold vs. Mather*, 5 Conn., 438, the court says:

> "It is a universal principle of pleading applicable to all courts, because founded on a reason which applies equally everywhere, that no fact can be assumed in favor of the party pleading, except it be directly averred, or arise by necessary inference."

See also

Lemon vs. Stevenson, 36 Ill., 51.
Stone vs. Young, 4 Kan., 11.
Coolbaugh vs. Roemer, 30 Minn., 424.
Cook vs. Putnam County, 70 Mo., 668.
Bartlett vs. Prescott, 41 N. H., 493.
Tooker vs. Amoux, 70 N. Y., 397.

Material facts must be alleged by direct averment and not by inference.

Stringer vs. Davis, 30 Cal., 318.
Moore vs. Besse, ibid., 570.
Bush vs. Cetta, 52 Ark., 378.

A pleading which affirms and also denies an essential fact shows no cause of action or defense.

Dickinson vs. Maguire, 9 Cal., 46.

The Court of Appeals meets our contention by saying of the complaint:

> "It contains the allegation, however, that the defendant in error is the owner of and in the possession of the St. Louis Quartz Lode mining claim, and all of the quartz rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral-bearing rock through their entire depth, the tops or apices of which lie within the surface lines of the said fractional portion of the St. Louis Lode mining claim. It describes the mining claim by metes and bounds, and shows that it is about 1500 feet in length by nearly 600 feet in width."
>
> 102 Fed., 130.

This language, so far as quoted above, is found in paragraph 2 of the complaint, and the whole of that paragraph must be taken into account when trying to settle what is therein pleaded. Fairly construed, it is that the plaintiff is the owner of the St. Louis lode and of the quartz rock and ore therein contained, SAVE AND EXCEPT. As to so much as is excepted therein it is not the owner; and it proceeds in the following paragraph, No. 3, to tell who is the owner. Is it possible to construct an issue upon this allegation? We have admitted it in our answer. There is nothing in it for us to deny, or that we care to deny, and least of all would we want to deny what is therein so clearly and plainly alleged—that we are the owners of the compromise ground and of all of the mineral therein contained. An issue is created by the allegation of a matter on one side and its denial by the other side. Here, so far as this controversy is concerned, there is and could be no issue. Here there is no assertion in the complaint of ownership of a single ounce of mineral

contained in the compromise ground. The opinion from which we have just quoted (102 Fed., 130) continues:

> "The description closes with these words: 'Said lodes numbered 54 and 55A extending 1,500 feet in length along said St. Louis vein or lode.' It alleges that the strip of land beneath the surface of which the ores in controversy were mined, lies east of the side line of the claim; it alleges that the dip of one of the veins having a portion of its apex inside of the surface of the St. Louis claim is to the east, and dips under and beneath the 30-foot strip of the Nine Hour claim, and proceeds to allege that from said vein so apexing within the St. Louis claim and extending beneath the Nine Hour claim, the ores in controversy have been taken by the plaintiff in error. No motion or demurrer was filed to the complaint, but the plaintiff in error answered upon the merits."

What is there in this language that asserts ownership of the ores in the compromise ground? Suppose the vein does enter under the compromise ground, is that an allegation that the plaintiff owns the mineral therein, contrary to its express allegations in paragraphs 2 and 3 of its complaint that the defendant owns the ground and all the mineral therein contained? We say no such inference can be drawn; and if it could, it would destroy the pleading. In construing a pleading, it must not be so construed as to make one part repugnant to the other. It is well established that where there is a repugnancy so gross as to destroy the meaning of the pleading, it is fatal.

Springfield Second Nat. Bank vs. Hart, 8 Ind. App., 20.

Wright vs. Card, 16 R. I., 719.

It cannot possibly be true that the plaintiff owns either the compromise ground or any of the mineral therein contained if the defendant owns them. A pleading which

affirms and also denies an essential fact shows no cause of action or defense.

Dickinson vs. Maguire, 9 Cal., 46.

We feel that we should apologize to this court for presenting at such length and with so many citations of authority a principle so fundamental in its character and so absolutely obvious upon the face of this pleading. But we beg the court to remember that this lawsuit has been long drawn out, and that thus far we have not been able to make obvious to the lower courts what seems so clear to us. We leave it, with one other suggestion. The Court of Appeals, contrary to all authorities, we think, infers a claim of ownership from the allegation at the beginning of the fourth paragraph of the complaint, which reads as follows:

> "That the dip of one of the veins having a portion of its top or apex inside of the surface location and patented ground of the St. Louis mining claim, is to the east and dips under and beneath the said Nine Hour Lode mining claim, including the said 30-foot strip or compromise ground, which is a part and portion of the said Nine Hour Quartz Lode mining claim, which said portion of said vein has its top or apex within the said St. Louis mining claim as follows, to wit:"

Then follows a description by courses and distances of the strike of the vein through the St. Louis claim, by reference to which and to the diagram attached to the complaint, a copy of which is found opposite page 5 of the record, it will be seen that the Drum Lummon vein traverses the St. Louis claim for a distance of 512.7 feet before it reaches a point opposite the north end of the compromise ground.

In the absence of any allegation to the contrary, why should not this claim, if there is any claim of ownership, be held applicable only to this portion of the apex which does not lie opposite the compromise ground, and why should

it not be held that the trespass alleged in the fifth paragraph of the complaint, in the absence of any allegation that it took place elsewhere, be construed as having taken place in this ground and not in the compromise ground. To infer, for it is a matter of pure inference, and not alleged, that the trespass or any part of it took place in the compromise ground, or that there is in this allegation a claim of ownership, is to make this complaint repugnant to itself, and, as we have already seen, it is the duty of the court to so construe it that each clause shall be consistent with every other clause.

The Court of Appeals, in disposing of our objection to the deficiency of this complaint, says that no motion or demurrer was filed to the complaint. In Montana, and perhaps in some other jurisdictions, it is not considered good practice to demur to a complaint on the ground of the want of a cause of action, unless it would be impossible for the plaintiff to set up a cause of action; nor is any such demurrer or motion necessary, under the practice of that State, to preserve the objection.

> "SEC. 685. If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action."
>
> Code Civ. Pro. of Montana.

If we had never raised this objection and if we raised it *ore tenus* in this court for the first time, it would be just as efficient as if we had raised it a dozen times by demurrer.

A VEIN THAT ENTERS AND DEPARTS THROUGH THE SAME LINE OF A MINING CLAIM CANNOT HAVE EXTRALATERAL RIGHTS.

Another reason why this complaint does not state facts sufficient to constitute a cause of action is that it is claiming extralateral rights for a vein which enters and departs through the same line of its claim.

In the complaint there is not a word said which indicates, or from which a just inference may arise, that there is any other vein within the surface boundaries of the St. Louis claim except the Drumlummon vein, the point of entry and departure of which is so clearly averred in paragraph 4 of the complaint. In passing upon this question it is to be remembered that it was raised at the beginning of the trial, before there had been a solitary word of testimony showing that there was any other vein. The Circuit Court had then to deal with a mining claim which, so far as the allegations of the complaint showed, had but a single vein in it (Record, p. 4), and that entered and departed through the same boundary line. There was nothing alleged by which the court could determine whether that line was a side line or an end line. Parallelism of the end lines is essential to the existence of extralateral rights.

Iron Silver M. Co. vs. Elgin M. Co., 118 U. S., 196.

It has long since become settled law that what are the end lines of a claim is to be determined, not by what the locator has designated as such, but by the strike or course of the lode through a claim; that is, an end line of a claim which is or would be crossed by the lode on its strike through the claim.

Flagstaff Mining Co. vs. Tarbet, 98 U. S., 463.
Iron S. M. Co. vs. Elgin M. Co., 118 U. S., 196.
Argentine M. Co. vs. Terrible M. Co., 122 U. S., 478.
King vs. Amy, etc., M. Co., 152 U. S., 222.
Del Monte vs. Last Chance M. Co., 171 U. S., 57.
Walrath vs. Champion M. Co., ibid., 293, 307.
New Dunderberg M. Co. vs. Old, 79 Fed., 598, 606.
Tyler vs. Sweeney, 79 Fed., 280.

The principle for which we contend is very clearly stated by a judge who has had a very wide experience in the determination of questions arising under the Mineral Lands Act, as follows:

> "The defendant's contention seems to be that because they claim they have subsequently discovered the apex of a lode running northerly and southerly, at the easterly line of their surface location, they have a right to follow the lode on its dip underneath the Cosmopolitan claim, without regard to the direction or course of the lode located by Foote. But that right, in law, depends upon the fact whether what are marked on the ground as the side lines of the location are in fact the side lines; and to determine that question we must look exclusively to the location and find out what the defendant Foote located; because, if he located on a lode that he thought had a northerly and southerly course, and made his location accordingly, and the subsequent developments proved that the locator was mistaken in the course of the lode, he would be bound by his own mistake, and governed and controlled in his right by the facts as they are shown to exist, instead of what he thought existed at the time the location was made."
>
> *Cosmopolitan Mining Co. vs. Foote*, 101 Fed Rep., 518, 521.

In the Cosmopolitan case the court found from the testimony that the discovered lode ran more nearly in an east and west direction through this claim than it did in a north and south direction, and for this reason refused to give the defendant extralateral rights under the Cosmopolitan surface.

It is no unusual thing, owing to the scoring away of the mountain sides by the action of the elements, to find the tops or apexes of veins entering and continuing for a greater or less distance inside the surface boundaries of another claim, as in this case, and therefore the question is one of im-

portance to mining men and those interested in the business The only decided case touching the question is that of—

Catron vs. Old, 23 Colo., 433; 48 Pac., 687.

It holds that a single line of a mining claim cannot be held to be parallel with itself, and therefore, under conditions similar to those presented in this case, it was held that the extralateral right to such a vein is cut off at the point where it would encounter the side line of the claim extended downward vertically.

If it should be urged that the doctrine of *Catron vs. Old, supra,* is applicable only to discovery veins, it may be responded that nothing in the principle announced in that case so limits, expressly or by proper inference or doctrine.

As stated in *Catron vs. Old* and by the Circuit Court of Appeals in this case, 104 Fed., 667, the question has not yet been determined.

This question, even upon the assumption that it was confined to a collateral vein, has not been determined or decided, unless decided by *Catron vs. Old,* in any case other than the one at bar. It is a question apt to occur in almost any location, and is therefore one for determination by this court. May a collateral vein have apex rights when its position is such that if it were the discovery vein it could not have or assert them? When it is recalled that extralateral rights are in contravention of the common law, are not to be extended by construction, are not favored by the courts, as is set forth in *Del Monte vs. Last Chance Mining Co.,* 171 U. S., 84, it would seem to follow that restrictions which would preclude the locator of a claim having these rights upon a vein which he had discovered and made the basis of his title and location would preclude his asserting them as to a chance vein which happened to be within his territory and occupied the same relations with reference to the boundaries of his claim. The Circuit Court of Appeals assumes that the Drumlummon vein was an incidental or collateral vein, and that the St.

Louis location or discovery vein extended through the claim substantially parallel with its side lines and crossing both end lines. This cannot be taken to be the case, and the court should have considered the law applicable to the contention presented by the plaintiff in error as to the facts with reference to these veins and alleged veins and their positions. The plaintiff in error did not recognize that there was a discovery vein or that the discovery vein of the St. Louis claim passed through the staked end lines of that claim, but by its evidence proved that the so-called discovery vein which existed in the discovery shaft of the St. Louis location ran crosswise of that location, so as to make the so-called staked side lines end lines of the claim, in which event, whatever should be the character of the Drumlummon vein, whether it was the vein in which ore was found and upon which the location of the St. Louis claim necessarily rested or it was but an incidental vein, apex rights would be denied because the St. Louis vein so ran crosswise of the staked course of that claim. Apex rights could not be asserted, because, in the first instance, if the Drumlummon is the discovery vein, the doctrine and logic of *Catron vs. Old* is applicable and conclusive, and if the St. Louis location is based upon the discovery of another vein, having the course contended for by the plaintiff in error, then the end lines thus established may not be passed through by a vein upon its dip, as would be done if the defendant in error should be permitted to follow upon its dip the Drumlummon vein into the territory of the plaintiff in error. That the position of the so-called discovery vein, being the vein disclosed in the discovery shaft of that claim, had the direction stated above is testified to by a number of witnesses on behalf of the plaintiff in error, as is shown by the Record, pages 70, 71, 77–78, and as is pointed out in the discussion under division IV of this brief. With this evidence in the case and with the plaintiff in error making the contentions to which we refer, the Circuit Court could not rightfully assume, nor might the

Circuit Court of Appeals, that the Drumlummon vein was not the discovery vein upon which the location of the St. Louis claim de[illegible]nded, nor that the course of the so-called discovery vein, [illegible]aimed to have been disclosed in the dis-discovery shaft [illegible]f the St. Louis claim, did not have the course and direction outlined by the witnesses for the plaintiff in error. Therefore the instruction should have been one in which the law was given upon these various contentions, to be applied to the facts as they should be found by the jury under proper instructions. If this had been done, or should now be done, then it would be necessary to investigate and pass upon the asserted extralateral rights upon the several contentions of the respective parties.

NOT ONLY WAS NO CAUSE OF ACTION STATED IN THE COMPLAINT BUT IN ALL THE PLEADINGS NO CAUSE OF ACTION ON BEHALF OF THE PLAINTIFF WAS STATED.

Not only did the complaint fail to state facts sufficient to constitute a cause of action, but on the whole pleadings there never was a cause of action stated. When in the replication the plaintiff admitted the execution of the bond and the deed and the adjudication in the Specific Performance case, it admitted itself out of court. The plaintiff by pleading cannot limit the force and effect of its agreement to convey and of the judgment or decree entered thereon, as it attempts to do in the replication, as follows:

> "That the said 30-foot strip or piece of compromise ground comprised a part and portion of what was known as the Nine Hour Lode mining claim mentioned in the said defendant's answer, and that no other right or title has been conveyed by reason of the said deed than such as attached and incident to the said 30-foot strip or compromise ground, and that the minerals therein contained were intended to

comprise, and did comprise only such minerals as were contained in veins, lodes or ledges having their tops or apexes inside of the said 30-foot strip."

Record, pp. 13, 14.

The courts below, we have no doubt, have been largely misled by these allegations, but beyond any question the parties are bound absolutely by what is contained in these instruments, and they cannot give them a construction, by pleading or otherwise, contrary to their express terms. These allegations are surplusage, purely and simply; they might have been striken out on motion, but were not, and no proof was offered on the part of the defendant in error, on either of the trials of this case, in support of them. As shown by the offered and rejected proof in this record, if any such proof had been admissible, it would have been exactly the other way.

IV.

NO PROOF WAS ADMISSIBLE IN THIS CASE OF MATERIAL FACTS NOT PLEADED.

Assignment of Error No. III.

The rule that the *allegata et probata* must correspond is too well settled to require discussion or the citation of authorities, and we therefore call attention only to a few which are illustrative.

When the codes were new the late lamented Associate Justice Field, when Chief Justice of the State of California, quoting from certain popular rules promulgated by the Code Commission of the State of New York, laid down the inflexible rule on this subject as we understand it in the case of *Greene vs. Palmer,* 15 Cal., 411, 415, as follows:

"Second Rule.—Those facts, and those only, must be stated which constitute the cause of action, the defense, or the reply.

"Therefore, *first*, each party must allege every fact which he is required to prove, and *will be precluded from proving any fact not alleged.*"

See also

Boone vs. Childs, 10 Pet., 177, 209.
Garland vs. Davis, 4 How., 148.
McKinley vs. Irvine, 13 Ala., 696.

One of the most essential things which the defendant in error was called upon to prove was the strike and dip of its discovery vein.

"This proposition we affirm, with the addition that the end lines of the original (*i. e.*, discovery) vein shall be the end lines of all the veins found within the surface boundaries."

Walrath vs. Champion M. Co., 171 U. S., 293–308.

This decision is in harmony with all of the side-end-line decisions, and no other conclusion could be reached by any fair construction of the statute. And yet here is a complaint without an intimation in it, from start to finish, that there is any other lode inside of the surface boundaries of the St. Louis, save and except the Drumlummon lode, which enters through its east boundary line and departs through the same line at a point further south.

The defendant in error could not possibly try its case without proving the strike and dip of its discovery vein, and in both trials, without any issue being made by the pleadings, the defendant spent days in trying to prove the course and direction of its discovery vein, and we spent other days in proving that the discovery vein of the St. Louis, instead of running lengthwise of the claim, ran diagonally across it. And, what is more to the point, we did prove, beyond the peradventure of a doubt, that the discovery

vein of the St. Louis, if it continued in its own direction and did not die out before it reached it, would cross the east boundary line of that claim, and therefore that the defendant in error, instead of following a vein on its dip under a side line of its claim, was claiming the right of extra-lateral pursuit under an end line of the claim.

How stands the proof on this very important question? In the first place, it is an admitted fact that the vein at the bottom of the 65-foot shaft, as shown in the defendant in error's map, Exhibit No. 1, is the discovery vein of the St. Louis claim. As shown by the map itself, the vein, if continued in its own direction, would not pass out of the end line of the St. Louis claim; and the proof is that since that map was made, there has been 80 or 100 feet of development work done on the vein which is not shown on the map; that, following it on its strike from the bottom of the 65-foot shaft, this new work shows the vein turning to the right or southward.

Mr. William Mayger testifies (Record, p. 21), when speaking of the discovery vein:

> "It runs very nearly parallel with the side lines of the St. Louis as staked. We have traced the vein to within 95 feet of the end line at the south end, and to a distance of about 400 feet from the north end."

Mr. Mayger is here speaking of both veins, the Ivanhoe and the St. Louis discovery veins. Both of these veins fall into the Transcontinental fissure and are 90 feet apart. It is the contention of the defendant in error that these two veins were originally one vein, and that there was a throw, by some upheaval, of 90 feet. That was one of the main contentions in the trial of the case, our theory being that these were two small independent fissures, probably caused by the Transcontinental fissure in which the Transcontinental tunnel is run, as shown on the maps; that this,

being a great and persistent fissure, had caused these two smaller fissures, entirely independent of each other, and which had become to a slight degree mineralized afterwards, although the great Transcontinental fissure itself, for some unexplained reason, did not become mineralized at all. We showed incontestably that the throw of these two veins had been only about 15 feet instead of 90, and exactly in the opposite direction from that claimed by the defendant in error. The struggle in rebuttal of the defendant in error was to make the incontestable testimony of the rocks harmonize with its theory of the greater throw.

Now, going back a little, we have Mr. Mayger testifying that they have developed his vein, which means the discovery shaft of the St. Louis, to within 400 feet of the north end of the claim, and there is no doubt of the proposition that this is the discovery vein of the St. Louis. He has testified to it, and we have not attempted to gainsay him.

The only witness on the strike of the vein is Professor Walter Proctor Jenney. Speaking still of the two veins treated as one, Professor Jenney says (Record, pp. 30, 31):

> "I have examined the discovery vein of the St. Louis Lode mining claim. Its course is substantially northeast and southwest. I *believe* that the discovery vein extends the full length of the claim from end to end. (The Professor is as easily convinced of a fact in favor of the side of the case that he is representing as most experts.) Explorations underground show that it lies within 750 feet of the north end line, and in the south end it is traced to within 95 feet of the end line."

Then follows testimony about certain unidentified croppings which he finds at various places.

What we call attention to especially is that these explorations underground show that the discovery vein of the St. Louis lies within 750 feet of the north end of the claim.

That would be true if the vein ran directly across the location and was found in the 65-foot shaft.

Here is an expert witness, competent to give courses and distances, but he is not interrogated with reference to them. On cross-examination we do interrogate him to some extent, but he is treating then of the vein as being composed of both the Ivanhoe and the St. Louis.

On the part of the plaintiff in error, Mr. Charles A. Molson, at pages 70-71 of Record, testified as follows:

> "To the eastward of the said drift (*i. e.* the Ivanhoe) there is a slate and granite contact. There is at that point a possible movement of 8 or 9 feet indicated, but there has been no throw of 90 feet. There is nothing on the surface to indicate such a throw. The last 84 or 85 feet of the level in the north drift shows a turn of 10 to 12 degrees northeast, and if the vein continued in the same direction it would cross the easterly side line of the St. Louis claim near the 520-foot plane."

This testimony relates to the discovery vein of the St. Louis, as admitted and claimed by the defendant in error.

On page 71 of the Record, Mr. Wilbur E. Sanders, another mining engineer, testifies as follows:

> "From the bottom of the 65-foot shaft, the course of the vein is north 73 deg. east, and if it continues in that direction it would cross south of the 520-foot plane as shown on the plaintiff's map."

Again, Mr. Richard M. Atwater, another mining engineer of large experience, after describing the work on the discovery vein, giving its development and the evidence found in the ground that there was no throw of 90 feet, and that the Ivanhoe and the St. Louis discovery were separate veins, says with reference to the latter (Record, p. 79):

> "If extended in its own direction the discovery vein would cross the easterly boundary line of the St.

Louis claim between corners numbers 1 and 2 at a point approximately 590 feet south of corner No. 1. I think the discovery vein is a very weak and irregular vein. I think the fissure is very likely caused by the Transcontinental fissure itself, and therefore it would only be a crack."

These witnesses are testifying to physical facts found in the ground. If they were wrong about the course of the level on the discovery vein, from the bottom of the 65-foot shaft easterly, it was only a question of applying instruments to show that fact incontestably. And yet when we go to the rebuttal (Record, pp. 84–85) there is not a single word of testimony to contradict the statement of these witnesses, and it is apparent that there simply couldn't be. The fact was, as shown by the development of their discovery vein, that if the little crack in the earth's surface which served them for a discovery vein extended in its own direction, it would without doubt cross the east boundary line of its claim.

We therefore respectfully submit that this proof shows the easterly boundary line of the St. Louis, under the decisions of this court and of every other court in the mining States and Territories, to be an end line and not a side line of the St. Louis location. It has never yet been held, and never can be held, under the Mineral Lands Act that a miner may follow a vein on its dip beyond the end line of his claim. Of course, the testimony actually given upon the question of the strike and dip of the original discovery vein is not all embraced in our assignment No. III, nor a tenth part of it.

On page 25 of the Record the court will find a stipulation made by counsel in open court that the objection there made was to cover all testimony offered by the plaintiff with reference to this important matter. We say, unless the rule of law is different from that stated by Mr. Justice Field in *Greene vs. Palmer, supra,* and the other decisions

above cited, that this was, beyond the peradventure of a doubt, reversible error, and this court should reverse the judgment if there was no other error in the case.

V.

A VEIN ENTERING AND DEPARTING THROUGH THE SAME BOUNDARY LINE OF A CLAIM WHERE THERE IS NO OTHER VEIN WITHIN THE SURFACE BOUNDARIES OF SUCH MINING CLAIM CANNOT HAVE EXTRALATERAL RIGHTS, AND PARTICULARLY IS THIS TRUE WHERE THE VEIN SO CROSSED ON ITS ENTRY AND DEPARTURE IS AN END LINE.

ASSIGNMENTS OF ERROR NOS. IV, XXXIV.

If there is no other vein in the St. Louis claim than the Drumlummon vein, then the end lines of that claim are not and cannot be determined by any vein whatever, unless they are determined by the Drumlummon vein. This is but to state an apparent truism. If the Drumlummon vein is the only vein within the St. Louis claim, then it is either the discovery vein or there was no discovery vein. If it is to be taken as the discovery vein, then we have a case in which the discovery vein passes through two different portions of a broken line constituting a staked side line which are not and cannot be parallel, and which cannot, for the purpose of extralateral rights, be treated as end lines, and there are therefore no end lines, either staked or constructive, which define or permit the existence of extralateral rights, and at once the doctrine of *Catron vs. Old,* 23 Colo., 433, *supra,* becomes applicable to the discussion we have made under division III and renders further discussion here superfluous.

VI.

ESTOPPEL.

ASSIGNMENTS OF ERROR NOS. V, XXVIII, XXIX, XXX.

In our statement of facts at the beginning of this brief we have given quite fully the history of the bond for a deed (Defendant's Exhibit A, attached to its answer, Record, p. 9), the deed made to the plaintiff in error by the defendant in error for the compromise ground (Record, p. 11), and the Specific Performance case, the judgment-roll of which appears in the Record, pages 41 to 54, inclusive. By the reference to the bond for a deed, it will be seen that, as a part of the property to be conveyed, was all of the mineral contained in the compromise ground. There was neither qualification, exception, nor reservation; and, giving to this word ALL its usual signification, it must mean every part of the contents of that strip of ground in which mineral of any character was found. From our point of view, it might as well be claimed that the defendant in error was entitled, after having made this bond and deed, to have mined out any other rock or substance found in the compromise ground as the mineral-bearing quartz rock and ore found therein. If the parties at the time of the making of this bond had intended this language to embrace only such mineral as might be found in veins or lodes having the whole of their tops or apexes within the surface boundaries of the compromise ground, or to reserve the mineral found or that might thereafter be found in veins or lodes having their tops or apexes within the surface boundaries of the St. Louis claim, they should have, by fit and appropriate language, made this reservation.

The deed which the defendant in error subsequently executed, reluctantly, in compliance with this bond, made

the mineral contents of the compromise ground and all of it a part of the conveying or descriptive clause of the deed, and it further conveyed to the plaintiff in error all the dips, spurs, and angles, and also the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges, and franchises thereto appendant and appurtenant, and also all and every right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, and to the said premises and every part and parcel thereof, with the appurtenances. This deed was a part of the judgment or decree in the Specific Performance case, and its form was passed upon and determined by the court in that case before the deed was executed.

In the judgment-roll of the Specific Performance case (Record, p. 52 *et seq.*) the court finds all of the issues raised by the pleadings in this case in favor of the plaintiff and against the defendant, and, as a conclusion of law, that the said defendants and each of them should be enjoined and perpetually restrained from asserting any right, title, or interest of any kind or character in or to the said compromise ground or any part thereof, and from in any manner interfering with the possession or enjoyment thereof by the plaintiff; and in the decree, after providing that the deed which is directed to be made shall be in form like the one hereunto annexed, a copy of which appears in the Record in case No. 305, October term, 1899, it further provides:

> "That the said defendants, and all persons claiming under them or either of them, be forever barred from all interest or claim to the said premises or to any part or portion thereof, or to the possession of the same or any thereof."

We have pleaded these three several instruments in our answer as constituting an estoppel against the defendant in

error from claiming any portion of the minerals contained in the compromise ground. The courts below have refused to give these instruments any effect as an estoppel, or to regard them as settling any rights between the parties, save and except that the plaintiff in error was to have and receive from the defendant in error a deed for the surface of the compromise ground. We respectfully submit that in this there was reversible error. As already stated, this case was appealed to the Supreme Court of the State of Montana, and the judgment affirmed. Afterwards a writ of error was sued out to this court, and the judgment of the District Court again affirmed (171 U. S., 650). Under these circumstances it would seem as if we were justified in regarding the question of the rights of the parties hereto in the compromise ground to be definitely settled and set at rest.

On the trial of the Specific Performance case the defendant in error was represented by able counsel, and if the findings of fact and the decree of that court were not warranted in every respect by the testimony, that fact should have been pointed out and the judgment of the court corrected in that regard. It had the benefit of two appeals, and in neither of the appellate courts was any suggestion made that the judgment was too broad on the facts presented in its own record, and therefore we say that it must be true that the defendant in error was estopped from claiming any of the mineral contained in the compromise ground.

We have already pointed out in a previous portion of this brief that it did not make any legal claim to this mineral; that nowhere in its complaint is there a word or syllable that by any possible construction can be held to be an averment that it is the owner of an ounce of the ore contained in that ground and for which in this case it has recovered a judgment of $195,000 and claims to have established its title to an additional segment of the vein in which there is probably a value of as much more. We say that this is an unique case and one without parallel in

the records of this or any other court, so far as our reading extends. Nevertheless the courts below have held, as shown by their judgments, that the defendant in error not only claims in a legal manner the mineral contents of the compromise ground, so far as the same is contained in the Drum Lummon lode, or any part of it having its apex or any part of it within the surface boundaries of the St. Louis, and therefore it is we must discuss this case as if this claim were found in the complaint. Says the court of Appeals in its opinion (102 Fed., 130):

> "The use of the words 'together with all the minerals therein contained' is not sufficient. These words so inserted in the contract and the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, 'together with dips, spurs, angles, and also the metals, ores, &c., therein.' "

The fact that the words "together with all the mineral therein contained" are a part of the conveying or descriptive clause of the deed signifies that the parties meant something by them. That they are not more significant than the other words quoted and said to be usually found in mining deeds is not conclusive. It is barely possible that if the authorities be closely examined it will be found that the words "dips, spurs, angles, metals, ores, etc.," themselves have some signification.

We may at the outset of this discussion admit that in our own opinion the words "together with all the mineral therein contained" do not particularly affect the efficiency of this deed as an instrument for conveying every right which the grantor had in the premises at the date of the conveyance, and that they were only put into the bond and into the deed to express the contract of the parties with clearness and precision, and to show that it was the intention of the parties to cut off and destroy all of the extralateral rights of the

grantor for the portion of the claim retained by it, in that portion conveyed.

Whatever may be the "inclusiveness" of these words, it seems to be very clear that when they were employed in the decree, even had they not been accompanied by a perpetual injunction precluding any claim of any kind on the part of the defendant in error within the bounded area of the compromise ground, they acquired a fixed, definite, and certain meaning, and without the injunction, but certainly with it, they operated to award the plaintiff in error every particle of mineral in the compromise ground. This conclusion is absolutely determined in the case of—

Bogart et al. vs. Amanda, etc., M. Co., 74 Pac., 822 (Colo.).

Reference to this case will show that it was an action upon a bond, not so favorable in its provisions as the bond in this case, given likewise to settle an adverse claim and followed by a Specific Performance case. It was held—in fact there was no dispute about the possession—that this language meant precisely what is claimed for the language in this decree. It will be noted in that case that, like in the case at bar, the decree included the mineral in the portion of the claim to be conveyed, and this upon appeal was affirmed, the court saying (p. 883):

> "That part of the agreement material here reads: 'The first parties agree within ten days after the issuance of the patent for the said Bogart lode, to convey to said second parties * * * the surface ground included within the conflict * * * saving, excluding and excepting from said deed so to be made the Bogart vein, lode, ledge or deposit wherever the same may be found to cross or pass through the conflicting surface.'
>
> * * * * * * * *
>
> "What was the intention of the parties at the time they made this agreement? If there is any am-

biguity in the language employed it must be resolved in favor of the grantee and against the grantors. The object of the court should be to place itself, as nearly as possible, in the position of the parties at the time, and from the terms of the contract and the surrounding circumstances arrive at their meaning. We do not think there is any difficulty in ascertaining this intention from the language of the written agreement. While there may be two distinct ownerships in mineral land—one of the surface or the soil, and the other of the minerals underneath—we are satisfied that by this agreement the applicant for the patent for the Bogart claim intended to convey to the owners of the conflicting location not merely the surface ground in conflict, as contradistinguished from the mineral beneath, but with this surface ground all underlying minerals except the Bogart vein. This is entirely clear from the excepting or reservation clause of the contract, whereby the owners of the Bogart reserved to themselves, and excepted from the grant, the Bogart vein. The agreement contemplated that the owners of the Bogart location might proceed without objection from the senior locators, to obtain a patent for the ground in conflict. When they got their patent they owned the entire estate, and by this agreement reserved to themselves, and excepted from the operation of the grant, only the Bogart vein. If it had been their intention to reserve all the mineral beneath the conflicting surface ground, they naturally would have made such provision in the excepting clause. Not having done so, but having excepted only the Bogart or cross-vein, it is plain that the intention of both parties was that the owners of the Amanda lode were to receive a conveyance of everything within the conflicting territory except the specific vein reserved."

THE BOND, THE JUDGMENT, AND THE DEED ARE ABSOLUTELY CONCLUSIVE OF THE RIGHTS OF THE PARTIES IN THE COMPROMISE GROUND.

We earnestly insist that the bond, the judgment, and the deed are absolutely conclusive of the rights of these parties in the present action, and there is no possible escape.

2 *Black on Judgments,* 503–505.

Since the decision of the celebrated case of the Duchess of Kingston the doctrine has been as stated and approved by the Supreme Court of the United States:

> "That the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or, as evidence, conclusive between the same parties upon the same matter directly in question in another court."
>
> *Cromwell vs. Sac. Co.,* 94 U. S., 351, 354.

In order to make the former judgment a bar it must be pleaded, not merely given in evidence.

Freeman on Judgments, 284, and cases cited.

The judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation, and constitutes a bar to any new action or suit involving the same cause of action, either before the same or any other tribunal.

Casey vs. Pennsylvania Asphalt Pav. Co., 109 Fed., 744.

New Orleans vs. Citizens' Bank, 167 U. S., 371.

Ball vs. Trenholm, 45 Fed., 588.

Same case affirmed, 114 Fed., 189.

Ala.—*Tunkersey vs. Pettis,* 71 Ala., 189.
Ariz.—*Reilley vs. Perkins,* 56 Pac., 734.
Fla.—*Hoon vs. Felkel,* 7 Fla., 44.
Ill.—*Stickney vs. Gourley,* 132 Ill., 213.
Ky.—*Wallace vs. Mesher,* 4 Bibb., 508.
La.—*Heroman vs. La. Deaf, etc., Institute,* 34 La. Ann., 805.
Me.—*Walker vs. Chase,* 53 Me., 258.
Md.—*Walsh vs. Chesapeake, etc., Canal Co.,* 59 Md., 423.
Mass.—*Bigelow vs. Windsor,* 1 Gray, 209.
Foster vs. Basted, 100 Mass., 409.
Jamaica Bond, etc., vs. Chandler, 121 Mass., 3.
Mich.—*Sayers vs. Auditor,* 124 Mich., 259.
Minn.—*Wisconsin vs. Toorins,* 28 Minn., 175.
Miss.—*Aznew vs. McElroy,* 48 Am. Dec., 772.
Mo.—*McKinney vs. Davies,* 6 Mo., 501
Neb.—*Spear vs. Tiddbell,* 40 Neb., 107.
N. H.—*King vs. Chase,* 41 Am. Dec., 675.
Neb.—*Dillon vs. Chi., etc., R. Co.,* 58 Neb., 472.
N. Y.—*Reynolds vs. Gamer,* 66 Barb., 310.
N. C.—*Burnhild vs. Freeman,* 80 N. C., 212.
Penn.—*Marsh vs. Pier,* 26 Am. Dec., 131.
Cist vs. Ziegler, 16 Am. Dec., 577.
Bell vs. Allegheny Co., 63 Am. St. Rep., 795, and note.
S. C.—*Marigault vs. Holmes,* Bailey, 283.
Vt.—*Porter vs. Gile,* 47 Vt., 620.
Va.—*Howison vs. Weedan,* 77 Va., 704.
W. Va.—*Burner vs. Hoener,* 26 Am. St., 948.
Wis.—*Rosenow vs. Gardner,* 99 Wis., 358.

The Montana statute defines a judgment to be "the final determination of the rights of the parties in an action or proceeding."

Mont. C. C. P., sec. 1000.

"By such provision the state declares the legal effect and consequences of such a judgment; that it shall end the controversy as between the parties and end it forever."

State vs. Savage, 90 N. W., 898; 91 N. W., 557.

Where the facts averred and relied on are substantially the same the fact that a different form or measure of relief is asked in the subsequent action will not deprive parties of the protection of the prior findings and judgment in their favor.

Green vs. Rogers, 158 U. S., 478-502.
Nat'l F. & P. Works vs. Oconto C. W. S. Co., 113 Fed., 793-803.

Any right, fact, or matter in issue and directly adjudicated upon or necessarily involved in the determination of an action is absolutely *res adjudicata,* and cannot be relitigated between the parties or their privies, whether the claim or demand, purpose, or subject-matter of the two suits be the same or not.

Burk vs. Beverley, 1 How. (U. S.), 134.
New Orleans vs. Citizens' Bank, 167 U. S., 371-396.
Sou. Pac. R. Co. vs. U. S., 168 U. S., 1.
Mitchell vs. Chicago 1st Nat'l Bank, 180 U. S., 471.
Sou. Pac. R. Co. vs. U. S., 183 U. S., 519.
Landen vs. Merc. Bank, 186 U. S., 458.
Russell vs. Lamb, 49 Fed., 770.
Norton vs. House of Mercy, 101 Fed., 384.
Estill Co. vs. Embry, 112 Fed., 882.
Eastern Bldg. & Loan Ass'n vs. Welling, 116 Fed., 100.
Ætna Life Ins. Co. vs. Hamilton Co., 117 Fed., 82.
Cal.—*Green vs. Thornton,* 130 Cal., 482.
Conn.—*Betts vs. Starr,* 13 Am. Dec., 94, and note.
Mass.—*Baxter vs. New England Marine Co.,* 6 Mass. 277; 4 Am. Dec., 125.
Burke vs. Miller, 4 Gray, 114.
Chamberlin vs. Preble, 11 Allen, 370.
Burlen vs. Shannon, 90 Mass., 200; 96 Am. Dec., 733.
Stockwell vs. Silloway, 113 Mass., 384.
Sly vs. Hunt, 159 Mass., 151; 38 Am. St. Rep., 403.

The same doctrine has been held by the appellate courts in each of the following States, viz: Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Vermont, Washington, West Virginia, Wisconsin.

Commentors upon *res adjudicata* have said it

> "renders white that which is black, and straight that which is crooked, *facit ex curo rectum, ex albo nigrum,* no other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy."
>
> *Jeter vs. Hewitt,* 22 How. (U. S.), 352, 364.

> "However numerous the questions involved in a suit, if they were tried and decided, the renewal of litigation for any of the same causes violates these cardinal principles of public policy, as much as if the suit presented but one single issue."
>
> *Whitehurst vs. Rogers,* 38 Md., 503.

> "The doctrine *judicium pro veritæ occipitur* is dictated by wisdom and sanctified by age, and is founded on the broad principle that it is to the interest of the public that there should be an end of litigation by the same parties and their privies, over a subject once fully and fairly adjudicated."
>
> *Martin vs. Evans,* 85 Md., 8; 60 Am. St. Rep., 292.

In *New Orleans vs. Citizens' Bank,* 167 U. S., 371, 398, the court quotes with approval the following:

> "No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies, whether the reasons upon which it was based were sound or not, and even if no reasons at all were given,

the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness.'

Cooley on Const. Lim., p. 47 *et seq.*, and authorities cited.

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of, reversal in a higher court."

Bigelow on Estoppel, 3d ed., outline pp. lxi, 29, 57, 103.

"Better opinion is that the estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined therein."

Aurora vs. West, 7 Wall., 82, 103.

For law of proof of *res adjudicata* see monograph note to *Fahey vs. Esterley Machine Co.*, 44 Am. St. Rep., 562.

It is true that the judgment on which we so confidently rely is the judgment of a State court, but such judgments are distinctly within the purview of article I, section 4, of the Constitution of the United States and section 905, United States Revised Statutes, passed to carry the constitutional provision into effect. Judgments rendered in a State court are recognized as binding in the federal courts, and the same force and effect are given to them as they would have in the court wherein they were rendered.

In *Mills vs. Duryea*, 7 Cranch, 481, Mr. Justice Story declared:

"It remains only then to inquire in every case what is the effect of the judgment in the State where it is rendered."

Mr. Justice Miller, in *Green vs. Van Buskirk*, 5 Wall., 309, declares this to be the leading case on this subject, and certainly its doctrine has never been questioned.

McElmoyle vs. Cohen, 13 Pet., 326.
Christmas vs. Russell, 5 Wall., 302.
Green vs. Van Buskirk, ibid., 310.
Crapo vs. Kelley, 16 Wall., 637.
Hilton vs. Guyot, 151 U. S., 182.
Mutual Life Ins. Co. vs. Harris, 97 U. S., 336.
Dow vs. Johnson, 100 U. S., 186.
Dillingham vs. Hawk, 60 Fed., 498.
Thompson vs. Whitman, 18 Wall., 457.
Hampton vs. McConnell, 3 Wheat., 235.
D'Arcy vs. Ketchum, 11 How., 175.
R. R. Co. vs. Wiggin's Ferry Co., 119 U. S., 622.
Alkire Gro. Co. vs. Richesin, 91 Fed., 83 *et passim*.

From all this it will be understood that our contention, distinctly stated, is that what was the intention of the parties by the use of the words "together with all the mineral therein contained" was fought out as between these parties in the Specific Performance case; that every issue in that case was expressly found against the St. Louis Company, and that every matter therein adjudicated is absolutely and forever determined.

THE JUDGMENT IN THE SPECIFIC PERFORMANCE CASE, THOUGH RENDERED IN A STATE COURT, WAS BINDING IN THE FEDERAL COURTS.

It will readily be perceived, from the most casual reading of the record of this case, that the judgment in the Specific Performance case (Record, p. 53), so far from being given full faith and credit, was not given any credit whatever

beyond the fact that a conveyance was decreed for the compromise ground. (See opinion Circuit Court of Appeals, 102 Fed., 130.) No notice whatever was taken of the fact that this judgment was a bar against the defendant in error claiming any interest or right to the said premises or to any part thereof or to the possession of the same or any thereof, nor is it held in any way to prevent the recovery by the defendant in error of damages for ores mined out of the said compromise ground.

The Constitution of the United States, article I, section 4, provides that

> "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such records shall be proved and the effect thereof."

Section 905 of the Revised Statutes of the United States was passed to carry this constitutional provision into effect. In it we find this provision:

> "The said records and judicial proceedings so authenticated shall have such faith and credit given to them within every court of the United States as they have by law or usage in the courts of the State from which they are taken."

The judgment in the Specific Performance case, as we have already seen, expressly directs a conveyance of the compromise ground by metes and bounds, *together with all the mineral therein contained*, without any exception or reservation whatever, and expressly restrains and forever bars the plaintiff in the court below (the defendant in error here) from all interest or claim in or to the said premises or any part or portion thereof or to the possession of the same or any portion thereof.

Nothing can be clearer, it seems to us, than that, under

the provisions of the Constitution and the statute just quoted, judgments rendered in a State court are recognized as having the same binding force in the federal courts that they have in the courts wherein they were rendered.

Now, irrespective of what was the character of the property, what was the situation of the parties, what were the issues in the action, are we not narrowed down to the simple and single inquiry, What was the judgment of the State District Court? And when we reach this inquiry is there any possibility of being mistaken in the answer? Does it admit of any possible doubt or uncertainty? Is it not that this defendant in error should convey to us, by a good and sufficient deed of conveyance, the compromise ground, describing the same by metes and bounds, together with all the mineral therein contained? It is not all the mineral therein contained, save and except such as may be found in leads having their tops or apexes in whole or in part, within the surface boundaries of the St. Louis claim, as alleged in the replication herein. True, the Circuit Court and the Circuit Court of Appeals have read this into the judgment, but in doing so they have committed error. It is beyond the jurisdiction or power of the plaintiff by pleading, or of the Circuit Court and the Circuit Court of Appeals by construction, to add to or take away one jot or tittle from this judgment.

Counsel for the defendant in error are vehement in declaring that in construing this judgment and deed and the bond upon which both rested regard must be had for the *peculiar* property to which they relate. To this we again beg to suggest that the most important thing in a mining claim is the mineral therein contained. A strip of barren mountain-side 30 feet in width and 400 feet in length is of no value to anybody for any purpose without the minerals therein contained. In other words, in this they insist on sucking the orange, and ask us to content ourselves with the

rind. If the judgment was in any respect too broad, they ought to have asked the court below, or the appellate courts to which the case was carried, to modify it; and the fact that they did not do so is conclusive that no modification of it was possible under the testimony.

"Together with ALL." Can there be any possible doubt of the import of this language, or is any court justified in construing it so as to give it any other meaning than that commonly understood? Charles Mayger, at the time he made the bond, had the right to convey the whole of the St. Louis claim or a part of it; he could convey the surface to one grantee and the mineral to another; he could convey the surface or the mineral separately or jointly, as he saw fit. This has long been settled. Messrs. Barringer and Adams, in their valuable work on mines, say:

> "Though minerals undisturbed, or in place, are a part of the freehold, and as such usually belong to the owner of the soil, they are capable of separate ownership and distinct possession. Where there is such a severance of estates, the minerals are real estate constituting a separate corporeal hereditament, capable of distinct inheritance and conveyance. There may be further separation of the different strata, or of minerals of different kinds, each of which may have a different owner, and constitute a distinct estate in land. Moreover, the grant of the permanent or absolute interest in the minerals effects such a severance and is equivalent to a conveyance in fee of the estate in the minerals separate from that of the owner of the soil."
>
> *Barringer & Adams, Law of Mines*, 35.

The words "together with," in connection with the previous mentioned subject in a deed or power, operate to enlarge, and not to restrain, that which was previously granted.

Winter vs. Loveden, 1 Lord Raymond, 267.

Cardigan vs. Armatage, 2 Barn. & Cres., 197.

> "The words 'together with' are equivalent to the word 'also,' which means 'likewise,' 'in like manner,' 'in addition to,' and denotes that something is added to that which precedes it."
>
> *Panton vs. Taft*, 22 Ill., 166.

In the case at bar that something is clearly defined. In addition to the compromise ground, described as it was specifically by metes and bounds, there was conveyed, and the plaintiff in error here was to have, *"all the mineral therein contained."*

NO FORMAL WORDS ARE NECESSARY IN A DEED TO PASS EXTRALATERAL RIGHTS.

The Court of Appeals, in speaking of extralateral rights, says (102 Fed., 130):

> "To manifest such an intention (*i. e.*, to convey extralateral rights) the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit."

We respectfully contend that in this statement the Court of Appeals was in error, and that the law is that unless these rights are reserved in a deed by apt language, "clear and explicit," they will pass where a part of a mining claim is conveyed by metes and bounds.

It is not necessary to cite authorities to show that at common law a deed to real estate passed every interest which the grantor had in the premises described unless some interest was expressly reserved therein.

Entering into the bond for a deed in this case and the deed which the obligor in the bond agreed thereafter voluntarily to deliver were subject to the laws of the State (then Territory) of Montana, a section of which is as follows:

> "That the common law of England, so far as the same is applicable and of a general nature, and not in

conflict with the special enactments of this Territory, shall be the LAW AND THE RULE OF DECISION, and shall be considered of full force until repealed by legislative authority."

Act of June 2, 1872.

And the proposition that the common law is in force in the State of Montana unless where repealed, either expressly or by some statute in conflict therewith, has been often held.

Territory vs. Ye Wan, 2 Mont., 479.
Territory vs. Virginia Road Co., ibid., 96.
Butte Hardware Co. vs. Sullivan, 7 Mont., 312.
Palmer vs. McMasters, 8 Mont., 192.
Milburn Mfg. Co. vs. Johnson, 9 Mont., 541.
Forrester vs. B. & M. Co., 21 Mont., 544, 557.

No other deed than a common-law deed is known to the statutes of the State of Montana. We cite other sections of the statutes of the State as follows:

"A transfer vests in the transferee ALL the actual title to the thing transferred which the transferrer then has, unless a different intention is expressed or necessarily implied."

Mont. Civ. Code, § 1490.

"The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself."

Ibid., § 1491.

"A grant is to be interpreted in favor of the grantee."

Ibid., § 1473.

"A transfer of real property passes all easements attached thereto."

Ibid., § 1510.

"A fee-simple title is presumed to be intended to pass by a grant of real property."
Ibid., § 1511.

"Every grant of an estate in real property is conclusive against the grantor."
Ibid., § 1513.

We respectfully inquire of counsel on the other side what there is in the statutes of Montana or in the statutes of the United States to prevent a deed for a part of a mining claim taking effect as a common-law deed and conveying to the grantee therein named everything within the defined surface boundaries extended downward vertically. When, and where, and how has the common law thus solemnly adopted and declared been altered or changed in the State of Montana? True, extralateral rights are conferred upon the miner by an act of Congress, but after he has secured them by virtue of his compliance with the provisions of the mineral lands act they belong to him, and without question he can convey them in any way he sees fit. When he has conveyed them and what form of words are necessary to convey them are questions that can be determined only by the laws of the State in which the mining claim is situated. It follows, therefore, in the case at bar, that if the words "together with all the mineral therein contained" had not been embodied in the deed for the compromise ground the extralateral rights of the grantor in that ground, as applicable to any portion of the lode apexing within the surface boundaries of the portion of the St. Louis claim not conveyed, must pass by the deed, unless its operation in this respect was limited by apt and appropriate words in the deed or other instrument of conveyance.

If the deed in this case is taken, carefully scrutinized, and investigated, it will be found to be clear, definite, and explicit, with nothing left to interpretation or conjecture, or

to be supplied by matters *aliunde* the document itself. When the subject-matter of its grant is likewise investigated, it will be found that the title thereto is a patent of the United States issued to the St. Louis Mining claim as a location made upon the public mineral domain, without any indication anywhere in it that any portion of the lands conveyed by the patent of the Government is of different date as to its location from any other portion thereof. Under these circumstances it would seem to be in accordance with the plain, well-settled principles of law that all any court can do in determining the rights of the parties in a law action such as this is would be to find what is described by the deed and to enforce its terms. It may not, we submit, go back of the terms of the deed, nor seek elsewhere for evidence or circumstances or light for the purpose of modifying or defeating the unmistakable grant which it contains. There exists in the deed nothing which authorizes the invocation of the rule of law upon which the Circuit Court of Appeals announces it proceeded, to wit, a resort to the nature of the property and the circumstances surrounding the execution of the deed for the purpose of ascertaining its meaning. That can only be done when the terms of the deed, its contents, render this necessary in order to determine what is conveyed by it.

Van Ness vs. City of Washington, R., 4 Pet., 285.
Tiernan vs. Jackson, 5 Pet., 594.
St. Louis vs. Rutz, 138 U. S., 243.
Devlin on Deeds, 2d ed., vol. 2, sec. 836.

The same rule applies with equal force to the terms and the result of the issuance of a patent. The issuance of a patent is the final act on the part of the Government, and conclusively establishes all which is asserted thereby, certainly as against the grantee in the patent and those claiming under conveyances from such grantee.

The patent in this case is the usual patent, and there is nothing in its terms which permits, suggests, or gives an

excuse for investigating the prior history of the territory embraced within the claim as patented or controversies which may have raged, however bitterly, before its issuance, since they are terminated conclusively by its issuance.

Boggs vs. Merced Co., 14 Cal., 279.
Waterloo Co. vs. Doe, 56 Fed. Rep., 685.
Calhoun Co. vs. Ajax Co., 192 U. S., 499.
Lavignino vs. Uhlig, 198 U. S., 443, 445.
Wright vs. Dubois, 21 Fed. Rep., 693, 696.
Mining Co. vs. Tunnel Co., 196 U. S., 337, 355.
Lindley on Mines, 2d ed., vol. 2, p. 1389, sec. 778.

If the contract is resorted to, which we maintain cannot be done, since the deed is all complete in itself and makes no reference thereto, it will be searched in vain for any clause, paragraph, or syllable which suggests, indicates, or gives an excuse for supposing that the ground which it provides shall be conveyed by the defendant in error shall take date as of the location of the Nine Hour claim, while the remaining portion which is surrendered in the compromise shall take date as of the location of the St. Louis claim, and the right be retained, notwithstanding the execution of this deed, in the defendant in error to absorb, extract, and convert to its own use everything of value in the conveyed territory. The contract is as clear and explicit as the deed and as the patent. Under the same rules of law which prohibit inquiries into matters *aliunde* the deed and the patent, as above stated, like investigations and inquiries are precluded with reference to the contract. In the contract itself is found nothing dubious, nothing which need be clarified or explained, and therefore no warrant exists for going into an investigation of the considerations respectively contributed by the parties to that contract, each to the other, for that which by its terms they in return are to receive.

The Circuit Court of Appeals, however, seems to have proceeded upon a misapprehension of the facts and a mis-

conception, as we urge, of the law applicable to such cases. It appears to have proceeded upon the theory that every apex and every portion of apex confers extralateral rights; that under the law there is to be no portion of a vein the ownership of which is not dependent upon and determined by the ownership of the apex or of a portion of the apex thereof, and therefore it is made a substantial part of the argument of that court, in reaching the conclusions of which we complain, that unless the construction which it places upon the deed and the contract and the patent shall be enforced, the title to the ore in the compromise strip is not determined by the ownership of the apex of it, and the defendant in error will be found to have made a bad bargain according to the express terms of its contract and according to the grant of its deed, which it was coerced by the court into making in pursuance of its contract.

In resorting to the supposed surrounding circumstances, the court in the opinion (102 Fed., 432) says:

> "If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial and it had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims without affecting rights to the ores beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action itself fixing the boundary upon the very line which they contended was the true line? It is not to be supposed that the owners of the St. Louis claim intended by the compromise contract not only to surrender the whole of their contention concerning the true location of the boundary

> line, but also to divest their claim of its extralateral rights—rights that had not been in litigation and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance under the circumstances need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient."

The court is here in fundamental error, for it is not true, as the record discloses, that if the adverse suit had gone to trial and the Nine Hour claim had prevailed to the full extent of its contention, the ground patented to the Nine Hour claim would have been that which was deeded and by the contract provided to be deeded. The area in controversy was much more extensive; it covered a larger area, it included all of the Drumlummon apex upon which the defendant in error relies for its extralateral rights. There is nothing in the record anywhere, nor in the testimony, nor in the findings of the jury upon any question submitted to them, which hints at or tends in any manner to establish the fact that the ground conveyed is all that was in dispute in the adverse litigation. The court assumes this fact, which is entirely outside of the record, and then utilizes it to put a construction upon the deed and the contract which flatly and unmistakable destroys the whole force and meaning of the words chosen by the contestants to express their meaning and which were by the court upon full investigation embodied in the deed. We do not, in urging this complete refutation of the court's position, concede that the power existed in this law action to annul the words, to vacate the contract which the parties had made, and to substitute for it something which the court argues would be necessary to fully protect the defendant in error in its supposed rights. It was for the contestants, the parties to the contract, having all the conditions which affected their controversy in mind, knowing all the surrounding circumstances, fully advised of the nature of the

property, to make their own contract, to embody it in apt language to express their meaning, and then to live up to its terms. No effort is made to reform the contract. The court says, in effect, that when a contract and deed declare in unmistakable terms that a specific piece of ground, with all the ore therein contained, is and shall be conveyed, it does not so mean; that what it means is that the grantor agrees to convey and conveys all the ore contained in the ground, which it does not own and has no right to convey, and that the very ground which it claims a right to convey, and which is therefore alone subject to its conveyance, is, without any words of exception or reservation, withdrawn from the operation of its contract and its deed.

After the Circuit Court of Appeals had announced its views upon this subject, and in order to make so plain the surrounding circumstances that no possible ground should be left upon which to base this argument, the plaintiff in error upon the new trial, offered to prove, by the introduction of the pleadings in the adverse suit, by the testimony of the locators of the Nine Hour claim, and otherwise, as shown by the record and as pointed out by assignments of error herein and the discussion of this matter under another head, that in fact the ground conveyed was not all that was in conflict in the adverse suit; that in fact the ground included in that conflict and within the Nine Hour location, and which at the time of the Nine Hour location was not covered at all by the St. Louis location, included all the apex upon which the defendant in error relied. While the court rigorously enforced the supposed law of the case and the opinion of the court above upon objections made by the defendant in error, this legitimate material and conclusive evidence was excluded. In other words, the remarkable condition was presented of a court basing its decision and a construction which overturned the express terms of a deed and a contract upon an assumed fact nowhere established by evidence in the record, and the court below, notwithstanding this was a

question of the utmost importance in the case, refusing to permit the truth to be shown upon this subject, which truth utterly demolished the foundation for this position, and the defendant in error, while clinging to and seeking to have the advantage secured by it upon this decision based upon an erroneous hypothesis and coining it into thousands of dollars, strenuously opposed the ascertainment of this same truth which would be so destructive of its contentions. But notwithstanding this ruling, erroneous, as we maintain, and which leaves us free to utilize the evidence offered for the purpose of this discussion as though received, the record discloses that in fact the court proceeded upon an erroneous hypothesis in assuming that the contract and deed gave or undertook to give to the plaintiff in error all the ground in conflict. Nor is it, we submit, a sound conclusion or statement of the law that surface rights only are determined in adverse litigations. In these litigations there is determined the title and ownership of the claim, and that includes the surface and all veins having their tops or apexes within the surface of the boundaries of the claim, and, as this court has adjudged, in the event that an enforceable extralateral right does not exist in some other claimant, the ownership of all ores that are found beneath the surface of the claim adjudged in the adverse proceedings to the one litigant or the other.

But we further urge that, where parties are in litigation and settle that litigation, it is for them to determine what consideration each shall confer upon the other for that purpose, and that when their contract plainly states that consideration and their conveyances grant that which is contracted to be conveyed in a law action in which the validity of the conveyance and the contract is not disputed and their terms are not sought to be reformed, no inquiry into the wisdom, propriety, justice, or probability of persons taking the action which has been in fact taken can be entered upon. That it is thus written in the contract, that it is thus con-

tained in the deed, is and must be the limit of the inquiry. We submit that this deed and this contract are to be taken according to their terms, and that it is immaterial, in ascertaining their meaning, whether they are the result of a compromise of previous controversies or whether for the first time the grantee became connected with the property by the conveyance to him of the property described in his deed and for a consideration paid in money to the grantor.

The court considers a compromise as a concession by the St. Louis Company that the claim of the Nine Hour claimants was right, and, proceeding upon its erroneous assumption that the ground conveyed is all that is in dispute, proceeds to treat the ground conveyed as a part of the Nine Hour claim and as of junior date to the location of the St. Louis claim. We discuss the last feature of this proposition under another head, but desire here to call attention to what we believe to be an error on the part of the Circuit Court of Appeals with reference to the nature of a compromise and the result of the position taken by the Circuit Court of Appeals upon the respective rights of the parties in this litigation.

In 102 Fed., 432, the Circuit Court of Appeals said:

> "The owners of the Nine Hour claimed nothing more than that the eastern side line of the St. Louis was surveyed and encroached upon their territory. They base their adverse action upon that contention. The compromise was an admission that their claim was just."

The pleadings which disclosed just what the plaintiff in error claimed were excluded by the Circuit Court at the instance of defendant in error, and that action was approved by the Circuit Court of Appeals. There is no ground upon which the court can base this statement of what the plaintiff in error claimed, and the statement, as we have shown, is incorrect.

We again call attention to the fact that the court here

misconceives the nature of the controversy between the two claims. It was not merely the position of a boundary line of the St. Louis claim, but the ownership, the prior valid location of the ground described in the conflict, with all the rights appertaining thereto, which were acquired by location or would pass by a patent of the Government therefor. Is it conceivable that after the trial of an adverse suit in which it is adjudged that A is the owner of the disputed territory and gets a patent from the Government therefor, that all he has established as against his contestants is the position of a surface line? Is there not also settled their respective claims of location and ownership of this territory and of all rights connected with it? The parties in this litigation did not respectively concede that the other was right. The St. Louis Company did not concede that the Nine Hour had a right to all the property to which it asserted title in the adverse suit. It entered upon negotiations with reference thereto and agreed that if the Nine Hour owners would permit the St. Louis claim to be patented in its entirety, would yield up all claim to the ground in conflict save the portion which was agreed to be conveyed to the Nine Hour owners, it would proceed to patent this territory, and when it was patented would convey the ground described in the deed—not all that was in conflict, but this lesser portion—by deed which, describing the property by metes and bounds, would convey all that territory and all the mineral therein contained, as shown by the terms of the deed itself, under the patent title it obtained for it, as a part of the St. Louis claim. The meaning and the language of the contract was, and the deed is, that in consideration for that which it received it would make this conveyance, and would so make it that, absolutely and forever, any claim it made to anything within the territory was extinguished and every right and interest in all ore therein should be the property and be conveyed to the owners of the Nine Hour claim. It is because of a fancied equity, based upon a wholly mythical foundation,

that the court has been misled into what seems to us a clear misinterpretation of the rights and the conduct, the contract, and the deed of the parties. By this contract it was agreed that, in consideration of surrendering much which it claimed, the Nine Hour owners should not only have the ground conveyed, as we have stated, but should have it as a part of the St. Louis claim, with all benefits of the date of the location of that claim which it would have in the hands of any grantee of the St. Louis owners after they had patented it as a part of the St. Louis claim.

A compromise does not concede that the other party is right; and we maintain as a legal proposition that the Circuit Court of Appeals is in error [illegible] says: "The compromise was an admission that th[illegible]n was just." Our position upon the compromise and [illegible] doctrine announced by the court is that a compromise does not concede or acknowledge that either party is wholly right, and surely does not permit either party to it to maintain such a position for the purpose of defeating the grant it made as its consideration for what it received under the compromise.

Webster's Dictionary thus defines "compromise:"

> "2. An amicable arrangement between parties in controversy to settle their differences by mutual concessions."

In *Smith's "Synonyms Discriminated,"* at page 62, there is a discussion of the history of "compromise," its etymology and meaning, and so far as it is applicable to what we are here investigating it states the meaning of the word as follows:

> "At present the spirit of compromise is that of forestalling judicial or authoritative decision by timely concessions, a taking and giving on both sides."

The *Century Dictionary* defines "compromise" as follows:

> "2. A settlement of differences by mutual concessions; an agreement or compact adopted as the means of superseding an undetermined controversy; a bargain or arrangement involving mutual concessions; figuratively, a combination of two rival systems, principles, etc., in which a part of each is sacrificed to make the combination possible."

> "O, glorious league!
> "Shall we, upon the footing of our land,
> "Send fair-play orders, and make *compromise*,
> "Insinuation, parley, and base truce,
> "To arms invasive?"
> *Shake., K. John,* v. 1.

> "All government is founded on *compromise* and barter."
> *Burke, Works,* II, 169.

> "It cannot be too emphatically asserted that this policy of *compromise*, alike in institutions, in actions, and in beliefs, which especially characterizes English life, is a policy essential to a society going through the transitions caused by continued growth and development."
> *H. Spencer, Study of Sociol.,* 396.

Similar quotations may be made from all the dictionaries of authority and like quotations from other authors.

I Beauvier's Law Dict., 308:

> "*Terms de la Ley:* Compromise is a mutual promise of two or more parties that are at controversie."

In *Huddersfield Bank vs. Lister,* II Chan., 285 (1895), Kay, L. J., says:

> "A compromise takes place where there is a question of doubt and the parties agree not to try it out but to settle it between themselves by a give-and-take arrangement."

The Civil Code of Louisiana, article 3071, defines a compromise as an agreement between two or more persons who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent in a manner which they agree on and which every one of them prefers to the hope of gaining balanced by the danger of losing.

Sharp vs. Knox, 4 La., 456, 460.

In *Attrill vs. Patterson,* 58 Md., 226, 245, it is said:

> "To compromise is to adjust a dispute by mutual concession. To negotiate means substantially the same thing—to effect something or an effort to effect something by a treaty or agreement. Negotiations and compromises exclude the idea of actual resort to hostile litigation."

As of like effect, see the following cases:

Landa vs. Obert, 25 S. W., 342, 346.

Continental National Bank vs. McGeoch, 92 Wis., 286.

Rankin vs. Schofield, 70 Ark., 83.

Gregg vs. Town of Weathersfield, 55 Vt., 385, 387.

Bellows vs. Sowles, 55 Vt., 391, 399.—In this case the court said that a compromise "is the yielding of something by each of two parties and can only exist when something is yielded by each party to it."

Colburn vs. Town of Groton, 66 N. H., 151.

The word "compromise," then, means—and was used in this sense by the owners of the Nine Hour claim and the St. Louis claim in their contract, wherein they speak of making a compromise (Record, p. 9)—an adjustment of differences by mutual concession, in which the concession of each is the consideration for the concession of the other, and in which neither party concedes that the other is wholly right, or perhaps does not so concede at all. The compromise

effects a disposition of the controversy in which neither party surrenders his entire claim and in which each takes something as a result of the adjustment. This is what the contestants did in this case. They compromised. The Nine Hour claim yielded up a part of its contention, its contention being that it owned, by superior title and prior location, all the conflict between the two claims, and the St. Louis Company yielded up its claim that it had the better right to the entire conflict, and the St. Louis Company was authorized to patent as a part of the St. Louis claim this conflict, permitted to retain all except the 30-foot strip, and required to deed that strip, with all the mineral therein contained; so that, as a consideration for the concessions and surrenders made by them, the Nine Hour claimants would have this ground, with all the mineral contained in it, unaffected by any claim of right thereto by the St. Louis Company on any ground whatever. It would be inconceivable that a compromise in this sense had been made, the effect of which was that the Nine Hour yielded up all of value involved in the controversy. When the true situation is considered, as the record now discloses it, the very argument upon which the Circuit Court of Appeals based its decision annulling the contract renders that annulment an impossibility. The decision of the Circuit Court of Appeals was that the interpretation of the deed which carried out its plain language would result in giving to the Nine Hour claim something which it would not have had if it had succeeded in obtaining all the ground in conflict, and for this reason the court in effect set aside the direct, plain, and unequivocal language of the contract because, as it seems, it thought the result which it refused to adjudge could not have been intended by the parties to the agreement; not that they had not so expressed themselves, but because the court thought it not probable that they should have so expressed themselves. When it is seen, as now, that to enforce literally and absolutely the exact terms of the deed and the contract does not

accomplish this reprehended result, but merely gives to the Nine Hour claim the little 30-foot strip of compromise ground, with all the ore therein contained, while leaving the ownership of the remainder of the ground in controversy in the defendant in error subject to the terms and controlled in that ownership by the express provisions of the contract and the deed, no support is left for the argument which controlled the decision of the Circuit Court of Appeals.

As the case now stands, the Circuit Court of Appeals was in error in its assumption of fact, and the case before it upon the second hearing was not the case the court decided when the case was first there, and hence the Circuit Court of Appeals upon this second hearing, upon its own reasoning, changed its decision and announced a different result. It seems, however, to have felt itself bound by what it had before adjudicated as being the law of the case until reversed, and to have held in effect that no relief could be obtained, notwithstanding the error of fact into which it had fallen, save by a decision of this court.

Is it not clear, then, upon a consideration of all the facts and the true relations of the parties and the terms of their contract and deed, that the rights under the contract were just as the contract provided for, and that for the consideration which was paid to the grantor the grantee was to have deeded to it the designated territory as patented, with all the rights as to seniority coming from being thus patented? For the surrender of territory it took title as against its grantor and all the world, just as the St. Louis Company held it under the patent before it made its deed. What was the ownership, what the title, what the date of the location of this deeded ground when owned and held by the St. Louis Company, and what would they have been with this title in the St. Louis Company had it succeeded in defeating the suit for specific performance or had the Nine Hour claim by some agreement surrendered its demand and claim for a deed? As a matter of law, upon the theory of compromise,

our position would be correct upon the real facts as they are now disclosed, and also upon the law of contracts. It would be true, for the contract contains nothing to the contrary and nothing requiring or permitting explanation or interpretation. Unless by some specific agreement in legal, binding form to that effect, the parties could not go back of the title as defined by the patent and the deed, for by conclusive presumption the patent settled the title and shut the gate upon inquiry back of it, and nothing short of a radical misconstruction of the contract would permit inquiry as to what had preceded its making.

It is said that the plaintiff in error claimed the ground conveyed to it as Nine Hour ground and asserted right to it by virtue of its location of it as Nine Hour ground. This is true. But in connection with that assertion it also contended and asserted that it was not only entitled to it as Nine Hour ground, but that the Nine Hour claim was superior to the St. Louis claim, prior in valid location as to this and other territory, all the territory in dispute, so that if its contention is to bind it, there must be given to it the full benefit of what it contended for, and this would establish the seniority of the Nine Hour location as to all of the ground in controversy and would make it impossible, upon the theory adopted by the Circuit Court of Appeals, for the St. Louis claim, with a portion or all of the width of the apex, to take the entire vein upon its dip in its extent through the 30-foot strip.

It must also be remembered, on the other hand, that the St. Louis claim contended and asserted that all the ground in conflict, including the 30-foot strip, was St. Louis ground, and that it only yielded up this claim or modified it or agreed so to do because, as it asserts, of a controversy which it claimed was unjust, and therefore it virtually took the position that it had given a part of the St. Louis claim in purchase of peace.

But, however these contentions may be regarded, they were all merged in the contract. They were swallowed up

in the compromise. They made the final result to be that this ground here in question was patented as St. Louis territory, and that it was agreed that when thus patented it should be conveyed to the Nine Hour people in settlement of the contentions theretofore existing between them, and which were thereby terminated, with the result that even if there had not been contained in the contract and in the deed the words "including all the ore contained in the compromise," the necessary legal effect of the contract and the deed would have been to convey it. If the deeded part was not a portion of the St. Louis claim, then this must be true as to the undeeded portion of the conflict, for the contention of the Nine Hour claim was not merely for the compromise ground, but for the conflict area, and that, therefore, would have been that the portion which is retained by the St. Louis claim, and in which their portion of the divided apex is found, and all the apex upon which they rely in this litigation, was Nine Hour ground and identical in date of location with that which was deeded, and the result is then the same. There is no seniority of the ground owned or obtained by the St. Louis Company over that conveyed to the Montana Company, and the theory upon which extra-lateral rights are asserted disappears.

If the whole matter of controversy and contract may be opened up—and this seems to be what was done by the Circuit Court of Appeals and the Circuit Court in reaching the result of which we complain—the record discloses the fact to be that no part of the conflict ground was embraced in the St. Louis claim at the time the Nine Hour claim was located, and therefore the Nine Hour location was older than the St. Louis as ground in conflict, and all the ground in conflict was first located by the Nine Hour claim when it was included in the Nine Hour location.

The contention that the ground deeded was deeded as Nine Hour ground while the ground retained was retained as St. Louis ground, and the mere fact that the date of the

location of the St. Louis claim was prior to the date of the location of the Nine Hour claim, and that these facts might be proved notwithstanding the contract and the patent, and resulted in a determination of seniority in the ownership of the respective portions of the apex, is an untenable position and is a mere begging of the question in argument. It is thoroughly settled by this court that the mineral statutes are a part of the patents issued by the Government, and that if the patent is broader in its grant than are the rights provided for by the statute, the statute shall be read into the patent and the patent narrowed down to the statue; and if the patent is narrower in its grant than the rights which the statute provides shall be secured by a location, the statute is read into the patent and the patent expanded to the extent and limits of the statute. In effect, that it is always in these controversies the statute and not the language put into the patent by the agents of the Government which is to be construed; that the patent is the statute and may not be construed or considered apart from or in conflict with the statute upon which it is based.

> *Morrison's Mining Rights*, 12th ed., p. 132; *Lindley on Min. Law*, 2d ed., secs. 171, 575, and cases cited in the notes thereto.

In *Deffeback vs. Hawke*, 115 U. S., 392, 406, this court said:

> "The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance with the recitals showing the compliance with the law and the conditions which it prescribed."

In *Davis vs. Weibold*, 139 U. S., 527, this court said:

> "But we do not attach any importance to the exception (referring to the exception in the patent), for the officers of the Land Department, being merely agents of the Government, have no authority to in-

sert in a patent any other terms than those of conveyance, with recitals, showing compliance with the conditions which the law prescribes. Could they insert clauses in patents at their own discretion, they could limit or enlarge their effect without warrant of law. The patent of a mining claim carries with it such rights to the land which includes the claim as the law confers, and no others, and these rights can neither be enlarged nor diminished by any reservations of the officers of the Land Department resting for their fitness only upon the judgment of those officials." (*Deffeback vs. Hawke,* 115 U. S., 392, 406.

These decisions and authorities in what has preceded we believe are conclusively determinative of this subject and show that the plaintiff in error is entitled to all the ore contained within the 30-foot strip, in whatever veins found, wherever the apexes of the veins in which it is contained may be, as against the defendant in error under its deed. If they are not, it is because it is to be taken that nothing is determined by the patent beyond the fact that the St. Louis claim should patent the ground and by the contract should convey this portion of it, leaving the relative ages of the St. Louis and Nine Hour claims open to investigation and trial at any time either party should assert some right based upon its ownership there which the other resisted. This theory finds no countenance in the contract, which does not attempt to affect the operation and result of the statute. The contract provides for nothing of this character and leaves the situation just as it would be if a conveyance had been made of the patented ground without the contract and for a consideration alien to the whole controversy.

VII.

WHERE THE APEX OF THE VEIN CROSSES THE BOUNDARY LINE OF A CLAIM AT AN ACUTE ANGLE, WHERE SHALL THE LINE MARKING THE EXTRALATERAL RIGHTS BE DRAWN DOWN?

WHEN BUT A PORTION OF THE WIDTH OF AN APEX IS WITHIN A CLAIM, MAY IT BASE EXTRALATERAL RIGHTS THEREON?

MAY A CLAIM HAVING BUT A PORTION OF THE WIDTH OF AN APEX WITHIN IT ASSERT EXTRALATERAL RIGHTS THEREON AND TAKE THE ENTIRE WIDTH OF THE VEIN FROM THE SURFACE DOWNWARD? .

WAS THE PORTION OF THE WIDTH OF APEX RETAINED IN THE ST. LOUIS CLAIM PRIOR IN DATE OF LOCATION TO THE PORTION IN WIDTH THEREOF CONVEYED TO THE PLAINTIFF IN ERROR?

MAY THE COURT IN THIS CASE INQUIRE, IN VIEW OF THE CONTRACT, THE PATENT, AND THE DEED MADE BY THE DEFENDANT IN ERROR TO THE PLAINTIFF IN ERROR, INTO THE RELATIVE AGES OF LOCATION OF DIFFERENT PORTIONS OF THE TERRITORY EMBRACED IN THE PATENT OF THE ST. LOUIS CLAIM, OR TREAT THE COMPROMISE GROUND AS OF THE DATE OF THE NINE HOUR LOCATION AND THE REMAINDER OF THE GROUND HELD BY THE DEFENDANT IN ERROR AS OF THE DATE OF THE ST. LOUIS CLAIMED LOCATION?

ASSIGNMENT OF ERRORS NOS. VI, XXVIII, XXXV, XXXVI, AND XL TO XLVIII, INCLUSIVE.

In the second paragraph of the complaint it is alleged that it (the St. Louis Company) is also the owner of, in

possession, and entitled to the possession of an additional portion of said apex of said claim lying to the south of the southern point hereinbefore mentioned a distance of twenty-five feet, whereat the foot-wall of the said vein passes out of the side line of the said St. Louis Lode mining claim. Here is an allegation of the ownership of a portion of the apex of the Drumlummon vein, but there is no claim, either expressed or implied, in this that it is entitled to the mineral found in the compromise ground, which, as we have already seen, it has admitted in paragraph II of its complaint was the property of the plaintiff in error. If it were only claiming such mineral as was to be found in the surface boundaries of its claim and in its claim west of the west line of the compromise ground, such claim would be in entire harmony with the admission previously made in its complaint. There was mineral from the 108 to the 133 foot plane to which it was entitled, but it was such mineral and such mineral only as lay to the west of that line drawn down vertically. We respectfully submit that under the well-established rules for the construction of pleadings to which we have already referred this language must be construed in this way; otherwise it would create a repugnancy. On the first trial of this case, as already stated, the Circuit Court limited the recovery to the ores found north of the 108-foot plane; in other words, to the point where the St. Louis Company had the whole of the apex within its surface boundaries. But the Circuit Court of Appeals in its decision in the 104 Federal, page 664, holds that this was error, and, as already stated, the case was reversed for this reason and ordered sent back for a new trial.

Waiving for the time being the proposition that no claim of ownership is anywhere set up in the complaint upon which the case was being tried of any ores in the compromise ground, we respectfully suggest that, so far as this question is concerned, the Circuit Court was right in its decision and the Court of Appeals clearly wrong.

In order to support the theory of the Court of Appeals the words "top or apex" as found in section 2322 of the Revised Statutes would have to be construed as reading "top or apex, or any part or portion thereof." In the case at bar it is manifest that as soon as the hanging wall crosses the westerly line of the compromise ground the defendant in error has not the whole of the top or apex of the Drumlummon vein on its side of the line. Proceeding southerly along the west side of the compromise ground, it has less and less of the apex until it reaches its 133-foot plane, where the foot wall crosses the line, at which point no part of the apex is within its surface boundaries. In order, therefore, to give it extralateral rights under the section of the mineral lands act cited it is necessary to read into that section the words we have suggested above—"the top or apex, or any part or portion thereof." This, we respectfully suggest, is beyond the power of the court to do.

> "Beyond the terms of the statute courts may not "go. They have no power of legislation. They can- "not assume the existence of a ny natural equity, and "rule that by reason of such equity, a party may fol- "low a vein into the territory of his neighbor, and "appropriate it to his own use. If cases arise for "which Congress has made no provision, *the courts "cannot supply the defect.* Congress having pre- "scribed the conditions upon which extralateral rights "may be acquired, a party must bring himself within "these conditions or else be content with simply the "mineral beneath the surface of his territory."
>
> *Del Monte M. Co. vs. Last Chance M. Co.*, 171 U. S., 55, 66.

We turn aside for a moment to call attention to the fact that the language just quoted is specially applicable to this case. The St. Louis was located nearly two years before the Nine Hour. The country was all open to Mr. Mayger at that time. He could then have laid the lines of his claim over

every foot of the territory afterward taken as the Nine Hour so as to include the great Drumlummon vein within his surface boundaries. He did not do it; he did not get a foot of it within his lines. When he surveyed for a patent he fraudulently included about six hundred lineal feet of that vein within his surveyed lines by wrongfully extending the east line of his St. Louis claim over the Nine Hour ground. By another fraud he succeeded in locating the westerly side line of the compromise ground forty feet six inches instead of fifty feet from the center of the Nine Hour discovery shaft, as called for in the bond. Out of this territory he has got, as this record shows, one hundred and eleven thousand dollars ($111,000). He ought to "be content with simply the mineral beneath the surface of his territory."

We quote again from *Del Monte M. Co. vs. Last Chance M. Co., supra,* as follows (p. 60):

> "The general rule of the common law was that "whoever had the fee of the soil owned all below "the surface, and this common law is the general "law of the States and Territories of the United "States, and in the absence of specific statutory "provisions or contracts, the simple inquiry as to "the extent of mining rights would be who owns "the surface."

There can be no controversy over a proposition so broadly and clearly stated. The mineral lands act, in so far as it gives extralateral rights, is an innovation upon this fundamental principle of the common law. By section 2322 of the Revised Statutes it has given this right to pursue a vein extralaterally beyond the side lines of a claim extended downward vertically only where the top or apex is within the boundaries of the claim, and it does not give it where only a part of the top or apex is thus within the surface boundaries of such claim, nor can the courts, by reason of the fact that the mining claim asserting this right of extra-

lateral pursuit is older in point of time than the mining claim whose territory is to be thus invaded, confer such right by construction. To do so would be to alter the common law in this respect beyond the import of the statute.

> "No statute is to be construed as altering the com-
> "mon law further than its words import. It is not
> "to be construed as making an innovation upon the
> "common law farther than its words import."
>
> *Shaw vs. Merchants' Nat'l Bank,* 101 U. S., 557, 565.
>
> *Sullivan vs. La Cross Steam Jacket Co.,* 10 Minn., 386.
>
> *Wilbur vs. Crane,* 13 Pick., 284.
>
> *Dwelly vs. Dwelly,* 46 Me., 377.
>
> *Jasper Trust Co. vs. Kansas City et al. R. Co.,* 42 Am. St. Rep., 79.

2. Another reason why the Court of Appeals was in error in drawing the bounding plane down at the 133-foot point instead of at the point where the hanging wall crosses the line, or the 108-foot plane, is that allowing the defendant in error extralateral rights between these points *is giving it the vein on its strike as well as its dip.* It is respectfully submitted that nothing in the act or in any decision can be found warranting such a conclusion.

3. Another reason which seems to us still stronger is that if the bounding plane is to be drawn at the 133-foot point it in fact gives to the defendant in error a triangular portion of the SURFACE of the compromise ground approximately containing one hundred and eighty-six square feet. While this action was one of trespass for ores mined out by the plaintiff in error, we think we may assume that it ought not to be allowed to recover for any ores which it might not itself have mined out. At this point, and on this portion of the lead, the valuable ores come approximately to the surface. Says Mr. Mayger: "The entire vein is stoped out

between the 108 and the 133-foot planes from the *surface* to the 190-foot level of the Montana Company's works" (Record, p. 25). And Mr. Parks, their engineer, says: "I have a block No. 1, the stope south of the north line of the Montana Company's apex shaft to the 133-foot plane, and from the *surface* to the instrument at K" (Record, p. 36).

This court has decided that this right can be exercised only in one way, and that is by following the apex of the vein on its dip into the adjoining territory, and that the party claiming all lateral pursuit of a vein which has its apex within its own territory cannot do so by driving a tunnel or level horizontally into the vein.

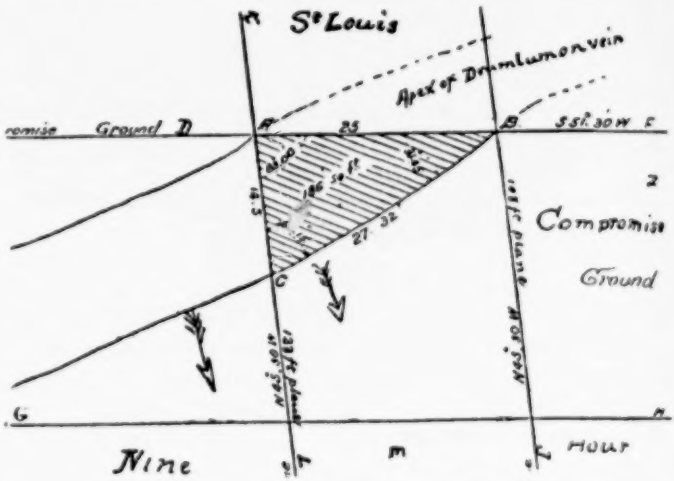
> *St. Louis M. & M. Co. of Mont. vs. Montana Ming. Co., Ltd.*, 194 U. S., 235.

There was therefore no method by which the defendant in error could itself have mined out this ore except by going upon the surface of the compromise ground and taking possession of so much of it as was requisite to follow the vein on its dip between its two planes. The very section of the mineral lands act which confers the right of extralateral pursuit of a vein forbids the appropriation of any portion of the surface in the exercise of this right. We quote from section 2322, United States Revised Statutes, as follows:

> "And nothing in this section shall authorize the "locator or possessor of a vein or lode which extends "in its downward course beyond the vertical lines of "his claim to enter upon the surface of a claim owned "or possessed by another."

By reference to the patent from the United States issued to the defendant in error for its St. Louis claim (Record, p. 40) it will be seen that it contains, as do all mineral land patents, a proviso or reservation in strict conformity with this provision of the law. The diagram hereto attached shows the angle at which the Drumlummon vein crosses the

west line of the compromise ground, the length for which the vein would be taken on the strike, and the form and the amount of the surface which would be taken away from us under the decision of the Court of Appeals, as reported in 104 Federal, 664. It is from a photograph of a map marked



"Defendant's Exhibit —," drawn by the witness Farmer, testified to by him as being correct, and introduced in evidence on the trial.

The triangle A–B–C shows distance taken on the strike of the vein and the surface taken. The line D–F is the west line of the compromise ground, and the line G–H its east line. The line I–J is plaintiff's 108-foot plane, and the line K–L its 133-foot plane.

This case brings to this court for the first time, so far as we are advised, the question of whether a split or divided apex confers extralateral rights upon a lode mining claim in which a part of the width of the apex is contained, and especially when the splitting of the apex occurs as in this

case. The question has arisen in a number of cases in different courts, and different results have been reached with reference to it. In the following cases it has been held that nothing less than the inclusion within the claim of the entire width of the apex confers extralateral rights:

Equator Lode vs. Colorado Central Lode, 11 Fed., Cas. 5931.

Turck vs. Colorado Central, 50 Fed. Rep., 888; 54 Fed Rep., 262.

In the tenth edition of Morrison's Mining Rights, at page 135, the controversy upon this subject is stated as follows:

> "In the controversy between the Equator lode and the Colorado Central lode, in the U. S. court at Denver, the lode was admitted by both parties to be, at the point of conflict, over 100 feet wide. Each claimed under a patent conveying a surface of 50 feet, the Equator covering the southern portion of the apex and the Colorado Central the northern. The court held that in such a case each party could hold only to its side line, and divided the lode by extending the south side line of the Colorado Central patent vertically downward through the lode.
>
> "In the case of Bullion Co. *v.* Eureka Co., 11 Pac., 515, the Supreme Court of Utah were divided, two judges holding that covering a part of the apex, gave a right to the dip, and the dissenting judge following Hall *v.* Equator Co.
>
> "All apex rights are a departure from the common law, and should therefore be strictly construed. The holding in the Equator case, as far as we know, has been uniformly followed by the *nisi prius* courts, and we cannot doubt that it is a correct application of the statute to the subject-matter.
>
> "The reasoning in the Stone Lode case, 14 M. R., 641, and the Amy Silversmith case, 152 U. S., 222, all tend to confirm this view, to wit: That the survey must cover the whole width of the apex to entitle it to extralateral rights."

In section 583, Lindley on Mines, first edition, and the same section in the second edition, will be found a statement of the controversy and extracts from authorities and decisions, to which we refer as illustrating the nature of the controversy and what has been held by different courts with reference to it.

In Barringer and Adams on Mines and Mining, page 442, we find the following:

> "And it has been held in Utah that this ownership extends to the entire width of the vein, even where the width of the apex is such as to extend beyond the side lines of the claim. It is hardly to be supposed that this will be followed elsewhere."

In *Fitzgerald vs. Clark*, 17 Mont., 100, the second assignment of error in the Supreme Court of Montana was as follows:

> "The court instructs the jury that if the whole apex of the Niagara vein or lode appears at any point within the surface location of the Niagara claim, then the respondent had the right to follow it on its dip beneath the surface of the Black Rock claim."

The jury found that the apex of the vein in controversy was entirely within the lines of the Niagara lode.

17 Mont., 103.

It seems that exceptions were not properly saved to the instruction, but the Supreme Court considered them on objections to the insufficiency of the pleadings, and the judgment of the court below was affirmed. The case was carried on writ of error to this court, where it was again affirmed.

Fitzgerald vs. Clark, 172 U. S., 292.

Colorado Central Consolidated Mining Co. vs. Turck, 50 Fed. Rep., 889, was a case in which the apex was split or di-

vided upon its strike—that is to say, the question was whether an apex *thus divided conferred extralateral rights*, and Judge Hallett, in his charge to the jury, held and instructed them that it did not.

Under the circumstances, we desire to call to the attention of the court, in addition to what we have above presented, some other matters bearing upon the proper construction of the federal apex statute.

By the act of May 10, 1872, following a policy foreshadowed by the act of July 26, 1866, the Government dealt with the mineral lands as lands, and did not treat the lodes as divorced or separated from the lands in which they were contained.

United States Revised Statutes, section 2318, reserved from sale, in all cases except as directed by law, "lands valuable for minerals."

Section 2319 provides that the valuable mineral deposits in surveyed and unsurveyed public lands shall be free and open to exploration and purchase, "and the lands in which they are found to occupation and purchase * * * ."

United States Revised Statutes, section 2325, defines the methods to be pursued in securing patent for "any land claimed and located for valuable deposits."

United States Revised Statutes, sections 2318, 2319, and 2325, furnish the provisions, under the Mineral Land Act of the United States for obtaining patents to mineral lands.

The extralateral right of a lode locator, as conferred by the federal statute, depends upon a compliance with the law, and until and only so far as he complies with the law is he entitled to the assertion of any extralateral rights by virtue of the location of a lode mining claim. He may have within his claim the apex, and yet, if the end lines are not parallel, may not follow it upon its dip beyond the surface boundaries of his claim. The location of a claim does not give necessarily any extralateral rights whatever. This was decided in the Amy Silversmith case by this court, in the Stone Lode or

Horseshoe case, and in other decisions, notwithstanding the apex as to its entire width was included in the locations.

Not only does the existence of the extralateral right depend upon a compliance with the law, but, as above indicated, the law conferring it is strictly construed.

Del Monte vs. Last Chance, supra.

With this as preliminary, and thus briefly adverted to, because it is elsewhere more fully stated, the inquiry is, Upon what ground may it be contended that where but a portion of the width of an apex is within a claim, the claim is entitled to the entire width of the vein upon its dip or descent into the earth, although a greater portion of the width is included in some other location? There is nothing in the statute itself which so provides. The defendant in error takes the position that it has a right to the whole vein where it has none or only a part of the apex, and up to where it has the whole in width, as illustrated in the map found at page — of this brief. In other words, the full width of the vein and apex where the apex lies, as in the triangle in the Nine Hour thirty-foot strip, is to be acquired and the apex rights as to the ore in the portion of the vein which it covers given to the ground that does not contain it. This is the condition, of course, wherever an apex crosses a side line at other than right angles. The question, therefore, is a general one, and of importance, for if the vein is of any width, and the difference in direction of the side lines of the claim is not great, the question may apply to large quantities of valuable ore, as is the fact in the present case.

The claim of the defendant in error gives an apex where there is none of the width of the apex within the St. Louis claim, up to the point where the whole of it is within the claim. The statute provides that these extralateral rights shall be had by the locators of claims when they comply with the law, where the apex, meaning necessarily the whole

of the apex, is in the location. The language of the statute is (sec. 2322):

> "The locators of all mining locations * * * so long as they comply with the laws of the United States * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth *the top or apex* of which lies *inside of such surface lines extended downward vertically*, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to *extend outside* the vertical side lines of such surface locations. But their right of possession to such *outside portions* of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations so continued in their own direction, that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim, to enter *upon the surface* of a claim owned or possessed by another."

The plain meaning of this statute, it seems, would be that when the apex, the top of the vein, is "inside" the boundary lines of the location, the extralateral right is conferred, notwithstanding the vein upon its dip may so far depart from a perpendicular as to pass "outside" of the side lines of the claim. Two features are prominent in the language of this statute: That the top or apex is inside of the claim; that upon the dip the vein passes outside of the side lines of the claim. This does not mean when a small part of the top or apex is inside of the claim, but necessarily means, since there is no limiting language contained in the statute, when all or the whole of the top or apex is inside the claim. If this is not true, then there must be imported into the statute, for the purpose of granting extralateral rights, words and a

thought not present therein. This will not be done, because this statute conferring a right upon the owner of a location which at common law he would not possess is in contravention of that common law and will not be extended. If the location must not contain the whole of the apex within its boundaries, then how much of the apex in width must it have in order to secure extralateral rights and the whole width of the vein upon the dip and also at the surface? Can a claim be made upon the possession of a small portion of the top of the vein, perhaps an inch or two, against a greater width, many feet perhaps, in another claim? How may it be said that an apex or top is within a claim, as the statute requires it shall be, when the greater portion of it is, or for that matter where any portion of it is, outside of the claim? How does a locator under these circumstances get all the surface within his claim, and the top or apex of a vein therein, when that top or apex is taken from him, and a portion of the surface of his claim also, by the locator of another claim which did not include this surface within its boundaries and has paid nothing for it to the Government, and did not include the top or apex within such claim? Suppose that the vein has no dip or departure from the vertical, and a small portion of its apex is within the St. Louis claim, and a larger portion is within the Nine Hour claim, what is the result? Each takes so much of the vein as is within his surface boundaries extended downward vertically. Suppose that a few inches in width of the vein is within the St. Louis claim, and that for five hundred feet upon its descent into the earth it is vertical, and then at that depth departs from a perpendicular, and the whole vein passes beneath the surface of the Nine Hour claim, what are the rights of the parties? Shall the St. Louis claim take the entire width of the vein from the surface downward? Shall it be permitted to take any part of the vein which lies within the boundaries of the Nine Hour claim? If it may, upon what reasoning, what theory? And yet in effect that is what

was adjudged to the defendant in error in this case, when it was given large bodies of valuable ore, no portion of the apex of which was within its territory, simply because further on a part of the apex was within its boundaries. It seems this same idea prevails and influences the determination in those cases in which it had been held, as in this, by the Circuit Court of Appeals that a part of a divided apex is as effective in conferring extralateral rights as the whole of it; that some one must have extralateral rights by virtue of the apex of every vein which departs from a perpendicular, and that some disadvantage or loss, unjust in its nature, and therefore to be prevented, is inflicted upon the locator of a claim who does not include for any extent upon its course the entire width of the apex, if he be not given all the rights which would accrue to him, had he, in compliance with the law, the entire width or apex within his claim. It should be remembered that the disadvantages of not securing all the apex of the discovery vein, or of any collateral vein within a location, because the whole or a part of it passes out of the side line is compensated by what is given under the terms of the statute.

When the claim, and in it the lode, was located, the Government selling the land by the acre and including therein the surface of the claim and all lodes having their tops within the boundaries of the location, by statute put the real estate, the land, on the footing of other real estate, and when it had thus changed the rule and the law as to the veins, being what was located, it departed from the plain purpose of the statute up to this point by adding thereto that, as to the lodes which had their tops or apexes inside the claim, the locator might, within certain limitations and upon certain precedent conditions, have the entire vein to whatever depth it extended into the earth and notwithstanding it so far departed from a perpendicular in its descent as to pass beyond or outside of the side lines of the claim. This new, this extraordinary, right, however, is granted only upon the existence of the con-

ditions fixed by the statute. The misfortune of failing to include the apex within the boundaries of the claim has been held not to modify the rule or change the law, where the vein crosses the side line before reaching the end line.

Again, if both side lines should be crossed by the vein in its course, at right angles, no apex rights exist, because the locator has not laid his claim along the vein. We speak generally of the vein passing out of a claim, which is of course inaccurate and misleading, for the apex has never been in fact within the claim. The location never did have or contain the apex within it, and for that reason, and to the extent that it failed to include it, never had a claim or right to it or interest in it, because for some reason, or without reason, and the law does not inquire into that matter, the claim was never so located as to give the locator this right.

Many cases discuss the misfortune of a locator in not so staking his claim as to include the apex of the located vein for the entire length of his claim, but they have always resolutely and rigorously declined to give him that which he did not so include within his claim. The spirit of these decisions applies with equal force when the locator fails to include the entire width of the apex within his claim as when he fails to include the vein or apex upon the strike of the lode. The argument that unless the doctrine applied in this case is enforced the statute fails is utterly fallacious, for the fact that he has not properly located his claim is what prevents the locator from securing this right, which he does not lose, but never had.

We have called attention to the circumstances under which extralateral rights do not exist when the locator has with care included the entire width of the apex within his claim. There is no reason why he should lose or fail thus to secure this valuable right, and others should secure it who have failed, more signally than he, to so include the apex within the location as to comply with the provisions of the mining statutes. Suppose that two claims of equal date of location

equally divided in width the apex of a vein, which vein is perpendicular for a considerable depth, and then departing from a perpendicular dips under one of these two claims, which, if either, of the claims owns the entire width in depth of the vein, and upon what theory? Is there here a case in which the possession of a portion of the apex cannot confer extralateral rights? The fact that the courts have unhesitatingly denied extralateral rights where the apex was entirely within the claim demonstrates that the supposed hardship of the case, or the supposed incompleteness of the statute, or the supposed difficulty in appropriating the veins because of the situation of the apex, has not, as it should not have, controlled the interpretation of the statute or given rights to those who have not fully complied with the law. The attempt to change the language of the statute, the propriety and justice of the interpretation of it, by the argument that unless this or that position is taken, this or that right conferred, there are things which the statute does not cover and which it should cover simply presents the old sophism, to which the courts have replied so often, that they construe or apply statutes, but do not make them, and that the question is not whether a statute should or might be adopted which would cover the case, but whether the existing statute covers it.

PRIORITY.

Assignments of Error Nos. XXXV and XXXVI.

The conclusion reached by the Court of Appeals that the St. Louis is entitled to follow the vein on its dip between its 108 and 133 foot planes is based upon the proposition that it was the senior location. It says:

> "And as, where the rights of two mining locators "are apparently equal with respect to mining

> " ground, the element of priority of location is con-
> " trolling, preference being generally given to the
> " senior locator" (*Argentine M. Co. vs. Terrible M. Co.*, 122 U. S., 478-484), "the entire vein would
> " be given to plaintiff in error."

This priority rests, in part at least, upon our admission in our answer. As already stated, we admitted the first three paragraphs of the complaint and interposed a general denial to the remainder of it. The last part of paragraph 3 is:

> "The discovery, location and recordation of the
> " said St. Louis Lode mining claim, and the United
> " States patent therefor, was made prior to the dis-
> " covery, location and recordation and patent to the
> " said Nine Hour Lode mining claim."

The admission cannot be broader than the allegation. We could not deny this. The location of the St. Louis was nearly two years before that of the Nine Hour. What is meant by "recordation" we scarcely know, but we assume it must mean recording the notice of location, and if so, that was earlier than any recordation made by us, as was also the patenting. We were therefore forced to admit these facts because they were facts. But this is not an admission by any means that the part of the area in conflict agreed to be surrendered to the St. Louis was in anywise senior to that portion which we were to have under our bond for a deed. The entire area in conflict, approximately two acres, was claimed by the St. Louis, as we have already seen, as being within its boundaries as staked and recorded in its notice of location. By the agreement contained in the bond, this entire area was to be patented as St. Louis surface. Now to say that one part of a patented mining claim can have priority over another part of the same claim seems to us to involve an absurdity.

And how does priority cut any figure in determining

this question? Is it not true that if the Nine Hour, together with the compromise ground, had been discovered and patented twenty years ago, and the St. Louis was a mere location made yesterday, and a vein was found having its apex within the St. Louis claim dipping under the Nine Hour surface, would not the St. Louis have the same right to follow it as if the conditions as to title were exactly reversed?

We also beg to respectfully suggest that there is nothing to be found in the case of *Argentine M. Co. vs. Terrible M. Co.*, 122 U. S., 478-484, cited by the Court of Appeals, which warrants this construction of the mineral land act.

In 2 *Lindley on Mines*, section 287, will be found a diagram of the several claims involved in that case; of the apex of the vein and the workings thereon. And reading the opinion of this honorable court in connection with this figure is sufficient to show what was the scope of its decision. It is one of the side-end-line cases, and that is the controlling thought in the entire opinion. True, Mr. Justice Field, who speaks for the court, remarks in the outset of the opinion:

> "Assuming that on the *same vein* there were sur-
> "face outcroppings within the boundaries of both
> " claims, the vein first located necessarily carried the
> " right to work the vein."

"Necessarily" because this is the express provision of section 2336 of the Revised Statutes; as, for example: Suppose there was the outcropping of a vein on the Camp Bird and another outcropping on the Pine, and in their course downward they met and united at the point marked "Tunnel" or any point under the surface, then this condition would fall under the section above cited, and the vein from the point of intersection downward would belong to the senior locator. And we respectfully suggest that upon the principle of *expressio unius est exclusio alterius* the doctrine could not be applied to the case at bar.

In what has just preceded, we have discussed at some

length the power and right of the Circuit Court of Appeals and the Circuit Court to, in effect, vacate and disregard the patent, the deed, and the contract or bond for a deed, and believe it may be fairly contended that we have demonstrated that this cannot legally be done.

We have further pointed out that in the event the court was at liberty to disregard the writings of the parties and the patent of the Government and inquire into the true relations of the claims and the litigants, the result would be that the court, upon all the evidence introduced and upon permitting all to be introduced which was offered and legitimately bore upon the subjects, would find, among other things, that the territory in conflict in the adverse suit was more than that covered by the 30-foot strip, and that all of it was first located as a part of the Nine Hour location; that therefore, treating the claim of the Nine Hour locators as just, the result would be that all this conflict area was, as to date of location, of the same date, to wit, the date of the location of the Nine Hour claim. This being true, it is immaterial whether the ground is to be taken under the patent to be all St. Louis territory and as having the date of the location of the St. Louis claim, or all to be taken as Nine Hour territory and of date of the location of the Nine Hour claim. It must, upon the facts, be all taken as the one or as the other, or else, as we maintain must be the result, the court must simply enforce the deed and give to the plaintiff in error the title under the patent which the deed purposely and plainly conveyed to it.

If we start with the St. Louis patent as the source of the title and follow it, with the deed, from the defendant in error to the plaintiff in error, but one result can follow. All portions of the territory embraced within the St. Louis claim was patented as the St. Louis claim. The deed necessarily conveyed the title which the patent granted, as to date of location, and determined by its own contents the extent of that grant, which was not merely of the surface of the ground, but of the segment of the earth's surface, determined

by extending down vertically the surface boundaries set forth in the deed, and as to all these contents of ore veins and mineral, of whatsoever nature the same might be, all of the title and right which the St. Louis Company had thereto up to the time of the making of the conveyance of this grant covered all the ore and all titles and rights, equitable and legal, from whatsoever source derived, which the defendant in error had thereto. This deed and this title made at once, so far as age was concerned, the ground conveyed of equal date with that which was not conveyed, and also made the question of the original source of title immaterial, since whatever rights and claims and titles the defendant in error had thereto it deliberately and purposely conveyed by language which could not be made more inclusive. If, however, the contract is referred to and an attempt is made, from its terms and surrounding circumstances, to elicit something which will justify an assault upon the integrity of the conveyance and the patent and permit the defeat of the unmistakable purpose of both the search through the contract and the surrounding facts and circumstances, when all of them are considered, when the real facts are investigated, when the truth is revealed, the attempt will be an utter failure.

The contract shows that neither of the parties thereto conceded the full claim of the other to be just or their own claims to be wrong, but acted upon the true theory of compromise, to wit, that a give-and-take settlement had been made, for in the contract (Record, pp. 9-11) it is said that—

> "The consideration of this obligation is such that whereas, a certain cause now depending in the District Court of the Third Judicial District, Lewis and Clark County, Montana, * * * has been compromised and settled and the said Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States land office at Helena, Montana, * * * said Charles Mayger * * * hereby covenants, promises and

> agrees to proceed at once upon the application now pending in the United States land office at Helena, Montana, for a patent to the St. Louis Lode claim described therein * * * and procure as soon as practicable a Government patent therefor, and when such title shall have been procured according to said application * * * covenants, promises and agrees to make, execute and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situate in Lewis and Clark county, Montana Territory, and comprising part of two certain quartz lode mining claims known as the St. Louis Lode mining claim and the Nine Hour Lode mining claim, particularly described as follows, to wit: (here follows description), including an area of about 12844.50 square feet, together with all the mineral therein contained."

The description itself refers to the boundaries of the St. Louis claim, so that no ground for contention exists that the purpose of the contract was other than to patent all ground within the St. Louis claim as a part of the St. Louis claim, and, when title to it had thus been obtained, to convey a specified portion of it, with all the mineral therein, to the plaintiff in error. The ground was specifically treated as a part of the two locations, but with the agreement that it was to be patented as a part of the St. Louis claim, and thereupon a conveyance of this lot of ground should be made as set forth in the obligation.

In the face of this contract and of the patent obtained under and as a result of it, and in despite of the very teeth of the deed, the courts in this litigation have ripped up the entire settlement, have ignored and cast aside the compromise, ignored or construed away the language of the parties employed in their contract and in their deed, and find that there were no mutual concessions—in substance, no consideration for such agreement and deed as was in fact made; determine that while the adverse claim of the Nine Hour

was conceded to be just, all that the Nine Hour claim should have under its agreement was the surface of the 30-foot strip; that the ores in the ground which gave it all its value were not conveyed by the deed, and thereby make the last estate of that claim worse than the first. Not only this, but after thus sweeping aside the contract and the conveyance and the patent, find, without evidence to support it—and this finding is essential, in addition to all which went before—that, as to the divided apex, the territory retained by the defendant in error is prior in location to that which is deeded. If the claim of the Nine Hour was just, as the Circuit Court of Appeals found was conceded, then as to all the conflict the Nine Hour claim was the earlier and the only valid location, and the division of this disputed territory, which was in fact all Nine Hour Territory, left no possibility of seniority of any part of it over the other. If the evidence which discloses the circumstances surrounding the property and the conveyance, and which discloses the real nature of the premises, is and may be resorted to, no basis is found for holding otherwise.

As we have pointed out, it will be found that the first location of this conflict area was as a part of the Nine Hour claim, and that any location of it or any part of it as St. Louis claim was long after its location as a part of the Nine Hour claim. While holding that the patent did not fix the age of the two portions of the conflict ground, the Circuit Court of Appeals approves the action of the Circuit Court in excluding testimony offered by the plaintiff in error to show, and which would have shown and did show, that, as to all this conflict ground, it was entirely outside of and not even touching the St. Louis claim location as it was when the Nine Hour claim was located, and that hence all the conflict was located at the same time as a part of the Nine Hour claim and long before the claims of the St. Louis claim were changed so as to include or cover the conflict ground or any part of it. The necessary result is that if this disregard

of solemn written contracts, deeds, and patents may be sustained and the facts back of them resorted to, all the ground in conflict, that in which defendant in error asserts its apex as well as that conveyed to the plaintiff in error, is of the same age and of the age of the Nine Hour location; that if one part is to be taken or treated as Nine Hour because so conveyed and the other part as St. Louis because retained by the defendant in error, then in truth the Nine Hour portion is the older in location. The patent may not be invoked to establish by relation the untruth that the conflict area is, as to date of location, and against the Nine Hour claim, older than the part conveyed, when the facts are that as a part of the St. Louis claim it is younger in location and as a part of the Nine Hour claim it is of equal date in location. If the compromise fixes the rights of the locations, and a compromise concedes the justice of the Nine Hour claim, the effect is just as though the Nine Hour claim had patented in an adverse suit, in which it asserted the priority of its location, the ground in conflict, and especially that portion which was conveyed to it, and would thereby establish the real priority and superiority of the Nine Hour over the St. Louis location as to this territory.

Upon the subject of priority of location of the several portions of the ground patented to the St. Louis claim, the doctrines apply, which we have presented earlier in this brief, to the fact that a litigant may not go back of the issuance of a patent to prove the attitude of the parties to the ground involved or the respective dates of conflict and locations thereof; and also there is equally applicable hereto the doctrine that a grantor conveying title which he has secured under such patent may not go back of the patent itself and show the relative ages of the territory involved, and that the ground deeded is junior to the part which is retained.

Equally applicable to this question of priority is the doctrine, before presented, that as to the contract the same

doctrine is applicable, and that since the contract herein treats the ground in conflict retained by the defendant in error and that conveyed to the plaintiff in error as of equal dates, so it must be treated in this investigation. The form in which the contract is signed represents the final result of all negotiations, merges all which has gone before, and conclusively establishes the agreement upon which the minds of the parties have met. It is incompetent, therefore, to go into what has preceded in the way of negotiations or history, since the parties, with all this before them and under consideration, have fixed the things which are determined by their contract, and upon that contract, so phrased, they must stand.

The contract, as to the subject of priority, is so clear, unambiguous, and unmistakable that all canons of construction and rules of evidence prohibit any inquiry back of its terms. Both doctrines, therefore, which relate to the conclusiveness of the patent, of the deed and the contract, prohibit what has been done in this case in attempting to establish, and by the court in finding, that there was a difference in the ages, as located, of the several portions of the conflict area. Even had there been diversity in dates of location, they were equalized by the patent and by the contract, and this was deliberately and purposely done.

But even if this unwarranted thing is done, the analysis and proper interpretation of the contract and the deed in the light of the true surrounding circumstances and the actual relations of the parties, the result is the same, and we are back again to the plain, express provisions of the contract and deed, without any excuse for varying or any pretext for defeating them.

The Circuit Court of Appeals' construction upon the subject of different priorities would engraft upon the contract terms which are directly antagonistic to those which it contains. That construction makes the contract to read, though no words are contained in it warranting this reading and no

surrounding circumstances give countenance to it, that while the ground shall be patented as St. Louis ground and then conveyed by the patentee of the St. Louis claim as a portion thereof, it is in fact, as to the part to be conveyed, to be patented as Nine Hour ground, as of the date of that location and conveyed as a part of that claim, thus taking away a part of the grant made for the consideration which the Nine Hour owners yielded up in order that they might have just such deed as the District Court of Lewis and Clark County awarded them. The effect of this construction is to say to the Nine Hour claimants: "You shall have no ore in this ground when the apex or any part of the apex of the vein containing it is in the portion patented by the St. Louis claim and retained by that claim, because we find and determine, without evidence and in violation of contracts, deeds and patents, that the retained area which was in conflict between you is older in location than that which is granted to you." This, too, when the contract not only has—and so has the deed—a clause which, between any other contracting parties and any other grantor and grantee—and we maintain, assuredly, between these contracting parties—includes all the ore in the ground conveyed, wherever the apex may be, whatever title thereto the defendant in error may have had and has to phraseology which accomplishes this result, *ex industria*, out of a superabundance of caution, added words which emphasize and double-rivet this meaning, constituting a legal back-stitching, which prevents this attempted ripping up of the meaning of the contracting parties and establishes in the plaintiff in error title to all the mineral contained therein.

No construction which can be put upon the federal statutes concerning the patenting of mining claims to which we have above referred and concerning their locations and what is acquired thereby authorizes the action of the Circuit Court and Circuit Court of Appeals in this behalf. On the contrary, the manifestly just and proper interpretation of these

statutes is hostile to and prevents such action. The safe and just thing, therefore, to be done is to enforce the contract, sustain the deed, preserve the patent, and give to the plaintiff in error its own, viz., all the mineral in the 30-foot strip.

We respectfully submit that the element of priority is not a factor in the determination of the rights of the parties in this case.

VIII.

OFFERED AND REJECTED PROOF.

Assignments of Error Nos. VII, VIII, IX, X, XI, XII, XIII, XIV, and XV.

We confess to no little embarrassment in discussing the questions presented by our assignments of error numbered from VII to XV, both inclusive. Our theory of this case is and always was, as above stated, that every question as to the purpose, contents, meaning, force, and effect of the bond for a deed (Defendant's Exhibit "A," attached to its answer) was tried out, set at rest, and forever disposed of, as between these parties, by the Specific Performance case.

The allegations contained in the replication with reference to the intent of the parties and the words found in the bond, the judgment, and the deed were mere surplusage which should have been stricken out on motion or disregarded on the trial, and in this, we believe, this court will agree with us. If this be so, then we must confess that the testimony offered was immaterial and was properly rejected by the court. And if the court had rejected it because of this, and held that these constituted a specific and perpetual bar to the relitigation of anything within the issues of that case, then, of course, we could not be heard to complain. But we submit that the Circuit Court was retrying this case, and the Court of Appeals passed upon it upon the theory that nothing was settled as between these parties except that the

Montana Company was to have a deed for the compromise ground; that what was meant by the words "*together with all of the mineral therein contained*" had not been ascertained, nor had the character of the west line of the compromise ground been determined as to whether it was the intention of the parties that it should be a vertical line, absolutely cutting off the right of either party beyond it, or whether it should be regarded as if it were simply the westerly line of the Nine Hour—the view actually taken of it by both courts. In short, the case was tried and reviewed as if every question that was or could be raised, save and except the right to the deed, was absolutely at large.

Again, the issue made by the allegations in the replication with reference to the intention of the parties in making these instruments, the intention of the court in rendering the judgment, and the constructive denial thereof under the section of the Code of Civil Procedure of the State of Montana already referred to raised the only substantial issue there was in the case so far as pleading was concerned. They had tendered this issue in the replication, and while they made no attempt to prove anything with reference to it, we clearly had the right, upon the theory upon which the case was being tried, to show exactly the reverse, namely, that it was the express intention of the parties, not only their intention but their contract, that Mr. Mayger should not have extralateral rights in the compromise ground; that before Mr. Robinson would accept the bond for a deed and dismiss his suit and withdraw his adverse claim, he went to Mr. Toole (counsel for Mayger) with the bond in his hand and asked him two questions, and his acceptance or rejection of the bond depended upon the answers which Mr. Toole gave him; that he had been expressly enjoined by his co-owners in the Nine Hour not to make any settlement which did not give them every ounce of mineral which might be found in the compromise ground, without regard to where the apex of the lead might be in which such mineral was found; that the exten-

sion of the east line of the St. Louis over the Nine Hour ground and that the claim set up on the part of the St. Louis to own any part of the Nine Hour surface was fraudulent and outrageous, and that the surrender of about six-sevenths of the ground in controversy between them was an ample and more than ample consideration for the conveyance to them of the little strip known as the compromise ground, together with its mineral contents. If under these circumstances the defendant in error is able to recover a judgment, it would be a travesty on justice and a judicial endorsement of fraud and wrong. While we cannot contend that under well-established legal principles we were entitled to have the testimony of these witnesses, yet we do say that upon the theory upon which the case was being tried this testimony was clearly admissible and its rejection error.

As to the evidence which showed or tended to show, and which the plaintiff in error offered to introduce, that when the Nine Hour claim was located no portion of the territory it covered was in conflict with the St. Louis claim, and in fact considerable territory intervened between them, and that long afterwards the St. Louis claim changed its boundaries so as to create a conflict, to wit, the conflict upon which the adverse suit was brought, it was offered upon the theory that if anything beyond the express terms of the deed and the patent could be resorted to, clearly this must be competent and admissible, for this evidence negatived the facts upon which the Circuit Court of Appeals had based its decision, and which facts were not proved, and to prove which no evidence whatever had been introduced. If, however, these matters could be construed, as they were by the courts, upon the theory upon which the case was tried, and for that purpose reference could be made to the surrounding circumstances about the parties when the deed was made and the obligation given which resulted in it, then what the truth was as to these circumstances and these conditions certainly was the legitimate subject of evidence, and the evidence

offered was competent, sufficient, and legitimate evidence to establish those facts. It was assuredly the right of the plaintiff in error to prove that the state of facts which the Circuit Court of Appeals had assumed in its opinion as the basis thereof did not in fact exist, and thereby render it, upon the theory of the decision, an erroneous decision.

IX.

THE COURT'S CHARGE TO THE JURY.

ASSIGNMENTS OF ERROR NOS. XVIII TO XXXIV, INCLUSIVE.

We maintain that the Circuit Court should have admitted in evidence the complaint in the case of Robinson *et al. vs.* Mayger, in the original Adverse Claim suit, for what was therein claimed is the basis of a result reached by the Circuit Court of Appeals in its opinion, and, as the offer discloses, this assumed basis and assumed purpose and object of the adverse suit and the extent of area to which it relates is erroneous. If it had been admitted, this complaint would have shown exactly what territory was claimed by the plaintiff in error and upon what title or right it based that claim, and that in fact the area in conflict was 1.98 acres. Elsewhere in what precedes we have necessarily, in discussing other subjects, discussed the propriety of this ruling and this exclusion.

Again, it was error not to have instructed the jury to find for the defendant, because, as the evidence before the jury stood at that time, it disclosed that the thing which the defendant in error was seeking to recover had been by the defendant in error actually conveyed to the plaintiff in error, and, as we have elsewhere herein shown, that no right existed in the defendant in error upon which it could recover this ore by the assertion of pretended apexes or otherwise, since every right, interest, and title to this ore, to the prem-

ises conveyed and all the mineral therein contained, had been deliberately and for a valuable consideration expressly conveyed by the defendant in error to the plaintiff in error. This requested instruction raised all the questions upon this subject which we have discussed, made their determination necessary, and if they or any of them had been determined in accordance with our contentions, the result must necessarily have been that the charge would be granted and the jury instructed to return a verdict in favor of the plaintiff in error.

ASSIGNMENTS OF ERROR XVIII, XXVIII, AND XXIX.

We except especially to that portion of the court's charge (Record, p. 89) in which it tells the jury that the defendant in its answer admits the corporate character of the parties, the ownership of the St. Louis Quartz Lode mining claim as alleged in the complaint, and that the discovery, location, and patent thereof were prior to the discovery, location, and patent of the Nine Hour Quartz Lode Mining Company, and then denies generally each and every other allegation of the complaint, following which the court says:

> "The defendant's answer, then, contains affirmative allegations which are not important in this trial, and therefore no further reference is made thereto."

It seems as if we might justly feel aggrieved when, after we had had such a prolonged and strenuous fight to get a deed which conveyed to us not only the compromise ground, but every ounce of mineral it contained, and also to obtain a decree not only awarding us the ground, but forever barring the plaintiff (the defendant in error here) from asserting any interest or claim to said premises or any part thereof or to the possession of the same or any thereof, the court passes over our plea of estoppel and absolutely dismisses it from the case so cavalierly. These allegations, these facts,

are most important in a trial involving exactly the same questions as were litigated in the Specific Performance case, and as to which the judgment is a conclusive bar, not to the plaintiff's rights in the case, because it has not asserted any, but to its recovery of $195,000 for a trespass upon ground which it alleges we own and for mineral which it likewise alleges is our property.

We submit the court should have given the instructions which we asked upon this matter embraced in our assignments Nos XIX and XX; at all events, that it should have laid down to the jury the law governing estoppel and submitted the question of whether the case fell within the law so laid down or not. Again we inquire, Is this giving full faith and credit to a judgment rendered in a State court, affirmed, and affirmed finally in this court, or is it giving any faith and credit to such judgment at all?

The decision of the court virtually annulled the deed and took from the jury all consideration of whether the surrounding circumstances upon which the Circuit Court of Appeals based its opinion in fact existed; determined that the deed did not affect the controversy at all; that the split apex conferred extralateral rights; that the defendant in error might apex ore which it had expressly conveyed; that two portions of the same claim, granted by the same patent, could, by a jury in a law action for the recovery of ore, be treated and should be treated as of different ages, the one as junior to the other. It was material and relevant, we submit, to show, as the deed and contract and judgment did show, that the very thing which the plaintiff in that case, the defendant in error, sought to recover from the plaintiff in error had been by it actually conveyed away, and therefore, by every rule of law and doctrine of good morals, it was without right to assert a title thereto or to seek a recovery therefor.

The objection which we desire especially to urge to these two instructions is not only that they change the *onus probandi* from the plaintiff to the defendant, where we claim that the *onus* remains with the plaintiff, but they impose upon us a burden beyond what is imposed by law, even if the *onus* is so changed.

The court will note that we are to show that the plaintiff (defendant in error here) has no extralateral rights in the Drumlummon vein, to the *satisfaction* of the jury And again, if the plaintiff has made a *prima facie* case showing that the strike of its discovery vein is generally lengthwise of its location, then we have to overcome this presumption by proof to the satisfaction of the jury.

Of course, we do not mean to claim that by this the court meant to instruct the jury that we must prove these things to them "beyond a reasonable doubt;" but the distinction between proving a fact to the satisfaction of the jury and beyond a reasonable doubt is so shadowy and indeterminate as to make it very hard to draw. It is sufficient for the plaintiff, who has the laboring oar, to prove a *prima facie* case; but when the burden shifts, as the court thought it did in this case, then a preponderance of the testimony, according to the court below, is not sufficient, but the fact must be proved to the satisfaction of the jury. Of course, it might be that the jury would be satisfied with a mere preponderance of the testimony on this question, and then again they might not be, and under the instruction they were authorized not to find in our favor unless they found facts in our favor upon testimony which could leave no possible doubt in the mind of a reasonable man. And these questions which we are thus to prove to the satisfaction of the jury are questions difficult for us to establish and easy for the plaintiff. They are questions dependent for their determination upon physical facts in the plaintiff's

St. Louis claim, to which we have no right of entry except as trespassers or under an order of the court.

We say, first, that the burden of proof did not change at all: that it was for the plaintiff, if it had tendered an issue upon this subject, to prove that it had a discovery vein, and that it had extralateral rights on its discovery vein in the same ground and in the same direction it was claiming the extralateral rights on the Drumlummon vein.

So far as we have been able to ascertain, there is no discord or conflict in the authorities upon this proposition.

> "The fifth instruction given for appellee is erroneous and should not have been given. It informs the jury that there can be no fraud without an intent to deceive, and that unless they were satisfied by a preponderance of the evidence. * * * It was also erroneous in saying to the jury that they must be satisfied by a preponderance of the evidence. This was improper, as it imposed a higher degree of proof than is imposed by the law. The jury were only required to believe from a preponderance of the evidence, and not to be satisfied by the proofs, as the instruction requires. Satisfactory evidence almost excludes doubt, whilst belief from a preponderance of evidence does not, but leaves the balance in the mind on one side of the proposition."
>
> *Ruff et al. vs. Jarrett,* 94 Ill., 475.

> "This language is too strong. Juries are required in civil cases to decide facts upon the weight or preponderance of the evidence, and this, too, where the proof does not show the fact in question to the satisfaction of the jury. In such cases the jury may find any given fact in a given way upon their judgment as to the weight or preponderance of evidence, though they may have reasonable doubts as to the real truth."
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> *Stratton vs. Central City Horse Ry. Co.,* 95 Ill., 25.
>
> *Graves vs. Colwell,* 90 Ill., 612.
>
> *Herrick vs. Gerry,* 83 Ill., 85.
>
> *Wolff vs. Van Housen,* 55 Ill. App., 295.
>
> *Connelly vs. Sullivan,* 50 Ill. App., 627.
>
> *Mitchell vs. Hindman,* 47 Ill. App., 431.
>
> *Gooch vs. Tobias,* 29 Ill. App., 268.

"The court below had instructed the jury, 'Unless the evidence before you establishes to your *satisfaction*. * * * The law required Chowning to establish his allegations by the preponderance of the evidence, but the charge of the court required him to produce evidence sufficient to establish greater degree of certainty in the minds of the jury than was demanded by law, which was error, for which this judgment must be reversed."

Willis vs. Chowning, 40 S. W., 395.

"This *prima facie* case can only be rebutted by the defendant showing to your *satisfaction*. * * * In civil cases, the party holding the burden of proof is entitled to a verdict if he establishes his cause of action or defense by producing a preponderance of evidence. This preponderance may not *satisfy* the jury, but it is in law all that is required of him. For this error in the charge we are compelled to reverse the judgment."

Texas, &c., *vs.* Ballinger, 40 S. W., 822.

McGill vs Hall, 26 S. W., 132.

In the last case cited, it is said:

"In the case of Feist *vs.* Boothe, 27 S. W., 33, and Fordyce *vs.* Chancey, 2 Tex. Civ., 21 S. W., 181, the use of the word 'satisfaction' in an instruction in a civil case required too high a degree of proof, and that such instruction constituted reversible error."

"The court had charged the jury: 'In every lawsuit the plaintiff says substantially, "I know the origin and occasion of the loss of which I now complain, and will establish to the full satisfaction of the jury, by clear and convincing proof of witnesses I know of, and will introduce, that the defendant, whom I have compelled to come into this court, is responsible in damages to me for the loss."' * * * This statement of the rule is entirely too vigorous, and puts upon the plaintiff the duty of making out his case beyond a reasonable doubt, which is only

required on the part of the State in criminal prosecutions. It is sufficient in civil cases, if, after weighing the evidence on both sides, a preponderance is the one way or the other. * * * The burden is upon the plaintiff to make out his case, and he is only required to do so by a preponderance; but when he has done so he is entitled to recover."

Gage vs. Louisville, &c., Co., 14 S. W., 73.
McMillan vs. Baxley, 16 S. E. (N. Car.), 845.
Torrey vs. Burney, 21 So. (Ala.), 349.
Evans vs. Montgomery, 55 N. W. (Mich.) 362.
Schenk vs. Dunkelow, 37 N. W. (Mich.), 886.
Crabtree vs. Reid, 15 Ill., 207.
Bitter vs. Saathoff, 98 *id.*, 266.

"The court also, in stating to the jury that they should be thoroughly *satisfied* that the conduct of the auctioneer was not merely negligent or careless, was giving to them an incorrect standard as to the conclusiveness of proof. In a civil case the jury need not be thoroughly satisfied of any fact claimed to be proven. If there is a preponderance of evidence in favor of the fact, they are bound so to find, whether they are thoroughly satisfied or the proof is conclusive to their minds or not."

O'Donohue vs. Simmons, 12 N. Y. Supp., 843.
Fernandez vs. McGinnis, 25 Ill. App., 167.
Bauchwitz vs. Tyman, 11 Ill. App., 187.
Bryan vs. Chicago, R. I. & P. Co. (Iowa), 19 N. W., 296.

The fact is not to be overlooked that it was not only in those portions of the court's charge to which we have especially called attention by our assignments of error above mentioned, but the same fault runs throughout the entire charge. The plaintiff's proof is sufficient if it establishes a *prima facie* case, while, when the burden shifts or where the burden was originally upon the defendant, it must make out its case by

proof which satisfies the mind of every juror. Such is not the law, and never was.

WILLFUL TRESPASS.

Assignments of Error Nos. XXI, XXII, XXIII, XXIV, XXV, and XXVI.

In this portion of its charge the court is trying to tell the jury that we were willful trespassers on our own ground, and that though the plaintiff in its complaint had not claimed this ground nor the mineral therein, but had expressly pleaded that it was our ground and our mineral, yet they might assess punitive damages against us. As to this we claim that even if the plaintiff had pleaded in its complaint facts showing a willful trespass, and had proved upon the trial the allegations of its complaint, the court did not correctly define to the jury what a willful trespass was and is, and that its construction is wholly wrong. The court's theory of a willful trespass seems to be that, if after we knew in any way, either by the commencement of the suit or otherwise, that the plaintiff (defendant in error here) was claiming extralateral rights in our ground, if we continued to mine, we were willful trespassers; and not only this, but as much so as if we were mining ore underneath the surface of the St. Louis and not within the boundaries of our own claim. It did not count for anything that we had a conveyance from this plaintiff for the compromise ground and its mineral contents, which conveyance is without any reddendum clause whatever and conveys to us absolutely every right which the plaintiff had in the ground; it mattered nothing what effect the fact that we had fought this right out through all the courts into which the case could be carried, and it had been finally adjudicated and determined, not only that we were the owners of the ground and the mineral, but

that the plaintiff had no right, title, or interest in or to them or to the possession of anything within these surface boundaries. The bare fact that, notwithstanding all this, the plaintiff still claimed some right or interest in the compromise ground in and of itself made us willful trespassers if we mined anything out of that ground after we had knowledge of this claim of the plaintiff. Is it possible that this can be the law?

> "The quality of the good faith which warrants its application is satisfied if the wrong was done without culpable negligence or willful disregard of the rights of others, in the *honest and reasonable belief that the act was rightful.* Notice of the existence of an adverse claim is an important element to be considered; but such notice alone will not necessarily place the wrong-doer in the position of a culpably willful trespasser and subject him to the more onerous measure of liability."
>
> *Sutherland on Damages,* § 1020, pp. 2987-2990.

> "On the other hand the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, *and the wrong was not intentional, the value of the property when first taken must govern.*"
>
> *Woodenware Cases,* 106 U. S., 432, 434.

The court was wrong—clearly wrong—as to what was a willful trespass, and it was further wrong when it told the jury that they might give damages beyond compensatory if they found that the trespass was willful. The mere fact that the trespass is willful is not sufficient in and of itself to give the jury the right to assess smart money, as evidently they did in this case, because the amount of their verdict is clearly shown on the face of this record to be far beyond compensatory.

In trespass, to justify the imposition of exemplary or

punitive damages, something more must be shown than the doing of an unlawful or injurious act. There must be evidence that the injury was inflicted maliciously or wantonly or with circumstances of contumely and indignity, or at least with wrongful motives.

Day vs. Woodworth, 13 How. (U. S.), 363.
Phila., &c., R. Co. vs. Quigley, 21 How. (U. S.), 202.
Milwaukee, &c., R. R. Co. vs. Arms, 91 U. S., 489, 493.
Fohrman vs. Con. Traction Co., 63 N. J. L., 391.

"None of these things, we think, can justly be imputed to the defendant here, under the evidence."

Thomas vs. Southern, 30 S. E., 343.
Alabama vs. Arnold, 4 So., 363.
Hansley vs. Jamesville, 32 L. R. A., 543.
Craven vs. Bloomingdale, 171 N. Y., 450.
Curran vs. Warfield, 60 Miss., 808.

"Again, the appellant failed to show any carelessness or recklessness in cutting of the trees, or any lack of reasonable precaution in endeavoring to ascertain the boundaries of appellee's land. Therefore, even conceding the agency and authority of Farlow, the appellee would only be liable for the actual value of the timber cut."

Compton, Ault & Co. vs. Marshall, 29 S. W., 1058.
3 *Elliott on Evidence*, § 2149.

"The burden rests upon the party who assails the faith of the transaction or conveyance, to show that it was fraudulent by either direct or circumstantial evidence.

"In the absence of evidence to the contrary, the law presumes that every man performs his business transactions in good faith and for honest purposes; and any one who assails the transaction or alleges that it was done in bad faith, or for a dishonest and

fraudulent purpose, has the burden of showing the fraud or bad faith."

Railroad Co. vs. Farnell, 98 U. S., 479.
Jones vs. Simpson, 116 U. S., 609.
Pruitt vs. Wilson, 103 U. S., 22.
Gulf, &c., R. R. Co. vs. Johnson, 54 Fed., 474.
Wilson vs. Fuller, 9 Kan., 365.
Hatch vs. Bagley, 12 Cush., 27.
Boughman vs. Penn, 31 Kan., 504.
Elliott vs. Stoddard, 98 Mass., 145.
Walker vs. Collins, 50 Fed., 737; 59 Fed., 70.

And the court was likewise wrong in that part of its charge, instruction No. 19, in which it tells the jury that "the defendant (plaintiff in error here) must satisfy you that its claim of good faith and honest intent would have been sufficient to excuse the willfulness of the trespass had it been committed upon and within the surface boundaries of the St. Louis claim." It almost seems unnecessary to cite a single authority to show how far wrong the court was in this proposition. The bare statement of it ought to be enough to refute it.

In *Mining Co. vs. Fitzgerald,* Fed. Cas., vol. 15, No. 8158, Judge Hallett concisely states the rule of law in this regard, to which, so far as we know, there has been no decision to the contrary save and except in the case at bar:

> "Within the lines of each location, the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top or apex in another territory.
>
> "To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one shall show by a preponderance of testimony, that such deposit belongs to another lode having its top or apex elsewhere."

To the same effect are the following cases:

Doe vs. Mining Co., 54 Fed., 935.
Con. Wyoming M. Co. vs. Champion M. Co., 63 Fed., 540.
Duggan vs. David, 4 Dak., 110.
Cheeseman vs. Shreve, 37 Fed., 37.
Iron S. M. Co. vs. Elgin M. Co., 118 U. S., 196.
Iron S. M. Co. vs. Campbell, 17 Colo., 267.

In *Iron Silver Mining Co. vs. Campbell, ut supra,* it is said:

> "A patent gives a *prima facie* right to the patentee to the exclusive possession of the premises covered by the patent. When others rely upon a right to follow into the patented territory a vein which they claim has its top or apex outside the premises covered by such patent, the burden to establish such right rests upon them."

And at page 275 Chief Justice Hayt says:

> "The plaintiffs, by the introduction of their patent, insured a *prima facie* right to the possession of the premises in controversy, and we are unable to find any admission in the complaint sufficient to overcome such *prima facie* showing. Appellants, relying upon the claim of right to follow their vein into the territory included within the side lines of plaintiff's claim, were properly held to have had the burden of proving such claim."

This proposition is so well established that it is surprising to find the Circuit Court for the District of Montana so wide of the mark.

Assignment XXXVII.

In our assignment No. XXXVII, which was directed towards the error in instruction No. 32 of the court's charge to the jury, it is fair to say that it gets this instruction directly

from the decision of the Court of Appeals, reported in 102 Fed., 130. One would hunt long and go far to find any case either supporting the doctrine laid down in this instruction or to the contrary; but it seems as if the bare statement of facts is sufficient to show that it must be erroneous.

The plaintiff in error was engaged in mining certain ores in the territory which was afterwards blocked out as defendant in error's blocks 8 and 10. To prevent this the defendant in error procured an injunction restraining the plaintiff in error from further extracting or removing any ore from the premises described or disposing of, treating, or reducing any of the ore that had been theretofore removed or extracted from said premises. A copy of this injunction order appears in the Record at page 80, and an order modifying it on page 81, followed by the agreement upon which the same was modified. Of the ores taken out there were 60 or 61 tons stored in the yards of the plaintiff in error at the time of the trial in this case, which ore, of course, was subject to the order of the court in the other action. In addition to that in the yards there were 65 or 70 tons in the upraise from the 190-foot level, only about 40 tons having been milled.

It seems to us that the jury should have been instructed not to consider the ore thus held under the plaintiff's injunction in estimating damages to be returned in this case. The theory upon which the case was being tried was that the defendant (plaintiff in error here) had taken, carried away, and converted to its own use certain ores, the property of the plaintiff (defendant in error here). Of course, as pointed out, no claim of this sort is made by any allegation in its complaint, and the court was trying this case upon the theory that such an allegation ought to be in the complaint, and that it would put it there even if the plaintiff had not done so. Now, how can it be said that a thing has been converted the conversion of which has been stopped by the plaintiff in the case by an injunction?

The defendant in error now has judgment for the value of these ores taken out of blocks 8 and 10. It is a maxim of equity jurisprudence that when once a court of equity has obtained jurisdiction of a cause it will retain it until it can do complete justice between the parties; and this without regard to the character of the remedy. A court of equity will often decree the payment of a sum of money as damages, or in other ways grant legal relief upon a suitable cause of action.

If the defendant in error shall succeed in the action which it has brought and in which this injunction order was issued, then the court can and ought to, and doubtless will, enter an order against the plaintiff in error, requiring it to turn over these ores so mined and held by it, and thereupon the defendant in error will have both its judgment for the value of the ores and the ores themselves. In other words, "it will have its cake and eat it, too."

> "The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in one suit the rights and duties of all the parties which really grow out of or are connected with the subject-matter of that suit."
>
> 1 *Pomeroy's Eq. Jurisp.*, § 114, and cases cited.

We must either leave the matter in this way and take chances on a suitable recovery or, under this instruction and the opinion of the Court of Appeals, we must go into court and surrender at discretion—that is, if we want to keep this plaintiff from proving damages against us in this suit for these ores so held under the injunction, we have got to surrender all claim to them, and then they may be offset. And in surrendering such claim, to be consistent, we should say in this suit, "We have no defense. What is the amount of your damage?" We respectfully submit that no decision can be found justifying this. And so we might continue,

but we are persuaded that we have already said more, and cited more authorities, than are necessary in a case of this kind; a case of *trespass quare fregit*, where the plaintiff says that he does not own the close that was broken nor the fruit trees that were damaged, but that the defendant owns them; a case where proof has been received on the most vital proposition in the case, with not a word of allegation in the pleading to warrant it; a case where the plaintiff, to maintain his contention, must establish that a line can be parallel with itself; that a judgment between the parties involving the same subject-matter is void and of no effect, and that it may enter upon, appropriate, and take possession of the whole or any part of the surface of a mining claim which may be necessary to enable him to follow a vein or lode, having a part of its apex in its surface, on its dip into an adjoining claim. Neither the rule of damages laid down in the charge nor any part of the instruction, for that matter, clearly or correctly expresses the law; but we do not deem it profitable to criticise them further.

X.

We submit the judgments below should be reversed.

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OCTOBER TERM, 1906.

No. 402.

MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

Decisions of Circuit Court of Appeals (102 Fed. Rep., 430, and 104 Fed. Rep., 664).

APPENDIX TO BRIEF FOR PLAINTIFF IN ERROR.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 24098

102 F. Rep., 430.

MONTANA MIN. CO., LIMITED,
v.
ST. LOUIS MIN. & MILL. CO. OF MONTANA.

(Circuit Court of Appeals, Ninth Circuit. May 14, 1900.)

No. 567.

1. MINING CLAIMS—CONVEYANCE TO SETTLE DISPUTED BOUNDARY—CONSTRUCTION.—In compliance with a decree for specific performance of a contract made between the owners of two adjoining mining claims in settlement of a suit brought to determine a disputed boundary between them, the owner of one claim conveyed to the owner of the other the strip in dispute, "together with all the mineral therein contained, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock, and earth therein." *Held,* that such conveyance had no other effect than to fix the surface boundary between the two claims in accordance with the original contention of the grantee, and did not deprive the grantor of any extralateral rights under the ground so conveyed; such boundary being a side line of its claim.
2. SAME—ACTION FOR CONVERSION OF ORE—PLEADING.—A complaint which alleges that plaintiff is the owner of a mining claim, and of all the precious metals contained in any vein or lode, through its entire depth, whose apex is within the surface lines of such claim, and that defendant, the owner of a claim which adjoins one of the side lines of plaintiff's, has mined and removed ore from a vein which has its apex in plaintiff's claim, is sufficient, in the absence of a demurrer thereto, to support a judgment in favor of plaintiff for the conversion of such ore, although it does not specifically allege the facts which show that the boundary between the claims of the parties is a side line of plaintiff's claim, beyond which it has extralateral rights.

3. SAME—POSSESSION OF VEIN.—Possession of the surface of a mining claim is possession of a vein or lode having its apex within the surface lines of the claim, although, in extending downward, such vein may pass beyond the vertical side lines of the claim, and will support an action of trespass for the removal of ore from such vein, beneath the surface of an adjoining claim.
4. SAME—TRESPASS—DAMAGES RECOVERABLE.—Where, in an action for the conversion of ore, an injunction has been issued, in compliance with which the defendant has stored certain ore theretofore mined, it is not entitled to have the value of such ore taken into account in reduction of damages unless it proves such value, and returns or tenders the ore to the plaintiff.

In Error to the Circuit Court of the United States for the District of Montana.

Chas. J. Hughes and Cullen, Day & Cullen, for plaintiff in error.
Arthur Brown, Thomas C. Bach, E. W. Toole, and H. P. Henderson, for defendant in error.

Before Gilbert, Ross, and Morrow, Circuit Judges.

GILBERT, *Circuit Judge:*

The defendant in error, the St. Louis Mining & Milling Company of Montana, was the plaintiff in an action brought against the plaintiff in error, the Montana Mining Company, Limited, for trespass and conversion of ore which was alleged to have been taken from the plaintiff's mine by the defendant in the action. The plaintiff in the action owned the St. Louis mining claim, and the defendant owned the Nine Hour mining claim, which adjoined it on the east. The principal contention in the case concerns the construction to be given to a conveyance which was executed by the owners of the St. Louis claim to the owners of the Nine Hour claim. The conveyance was made to settle a controversy that had arisen concerning the easterly boundary line of the St. Louis claim. That was the older of the two claims. At the time of applying for a patent the locators thereof included in their survey a portion of the premises which were

claimed by the owners of the Nine Hour claim. The latter made an adverse claim, and brought an action thereupon. Before the cause came on for trial the suit was compromised. It was agreed that, as soon as patent was obtained to the St. Louis claim, the owners thereof would convey back to the owners of the Nine Hour claim the strip of land which was in controversy,—a strip 30 feet wide, to be described by metes and bounds,—"together with all mineral therein contained." The owners of the St. Louis claim, having obtained the patent, refused to make the conveyance. Suit was brought by the owners of the Nine Hour claim for specific performance of the contract. In the complaint in that suit it was alleged that the contract had been made "for the purpose of settling and agreeing upon the boundary line between the said Nine Hour lode-mining claim and the said St. Louis mining claim." A decree was rendered in the suit in favor of the plaintiff therein, and in pursuance thereof a conveyance was executed by the St. Louis Mining & Milling Company, the defendant in error here, conveying to the Montana Mining Company, Limited, the 30-foot strip, by metes and bounds, "together with all the mineral therein contained, together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock, and earth therein," etc. It was shown upon the trial of the case at bar that in the St. Louis claim there are two veins,—one, the discovery vein, running through the claim from end to end, northerly and southerly, and dipping to the east; and a second vein apexing for a long distance within the claim, and dipping easterly underneath the Nine Hour claim, a portion thereof dipping underneath the premises which were conveyed by the deed above referred to. The question involved in the suit is the ownership of the ores of said second vein, which lie beneath the said conveyed premises, and of which the apex of the vein which carries the same lies entirely within the St. Louis claim.

It is contended by the plaintiff in error that by the deed above referred to there was conveyed to it, from the owners of the St. Louis claim, title to all the ores lying beneath the surface of the strip of land therein described, and lying eastward of a vertical plane extended downward on the division line so created between the two claims. We are unable to assent to this contention. In interpreting the conveyance in question, regard must be had, not only to its terms, but to

the subject-matter involved and the surrounding circumstances, in order to ascertain the intention of the parties. Said the court in Richmond Min. Co. *v.* Eureka Min. Co. 103 U. S. 846, 26 L. Ed. 560, "The language used is to be construed with reference to the peculiar property about which the parties were contracting." The court, in the light of the circumstances of that case, held that a line "continued downward to the center of the earth was not a vertical plane, but must be construed as extending the boundary line downward through the dips of the veins or lodes wherever they might go in their course towards the center of the earth." The controversy between the owners of the St. Louis and the Nine Hour claims was one which involved surface lines only. No dispute had arisen concerning the ores beneath the surface. The owners of the Nine Hour claimed nothing more than that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory. They based their adverse action upon that contention. The compromise was an admission that their claim was just. When the suit was brought for the specific performance of the compromise contract, it was brought by the successors in interest of those who had represented the Nine Hour claim at the time of the compromise. The plaintiffs therein were not the assignees of the contract. They maintained the suit solely as owners of the Nine Hour claim, and upon the theory that the strip of land so contracted to be conveyed was a portion of the Nine Hour claim. All these antecedent circumstances leading up to and culminating in the deed are properly considered in determining what was the intent of the parties to the contract. If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial, and had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims, without affecting rights to the ores beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action

itself, fixing the boundary upon the very line which they *contended* was the true line? It is not to be supposed that the owners of the St. Louis claim intended, by the compromise contract, not only to surrender the whole of their contention concerning the true location of the boundary line, but also to devest their claim of its extralateral rights,—rights that had not been in litigation, and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words "together with all the minerals therein contained" is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, "together with dips, spurs, angles, and also all the metals, ores, etc., therein." Counsel for the plaintiff in error rely upon two decisions which, it is said, favor the construction which they contend for,—the Eureka Case, 4 Sawy. 302, Fed. Cas. No. 4,548, and Stinchfield *v.* Gillis, 107 Cal. 86, 40 Pac. 98. In the first case two owners of several adjoining claims had fixed and agreed upon a line running northerly for a fixed distance, which should be a division between the claims. It was not a line running with the strike of the vein, but across it. Thereafter a controversy arose concerning the right to mine the ores of the vein at a point beneath the surface further north than the line of division extended. The court held that the line so arbitrarily adopted must be projected as far as the lode extended, and must necessarily divide all that the location upon the surface carried. In that case the parties to the agreement had, by the terms thereof, made so clear their intention to divide their claims by a vertical plane, and to confine their mining rights to either side thereof, that there was no room for construction. In the case of Stinchfield *v.* Gillis it was held that if the locator of a mining claim should convey a portion of his claim by metes and bounds, without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed, in any vein whose apex was within the surface lines of his deed. Said the court (page 90, 107 Cal., and page 100, 40 Pac.), "All that we hold is that inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff,

and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff." We do not see that either case affords light upon the proposition involved in the case at bar. Upon consideration of all the circumstances, we entertain no doubt that it was the purpose of the contracting parties to fix a boundary line between the two mining claims, reserving to each claim the rights that would have attached if the boundary line had been settled without controversy; and the language of the contract and of the deed sustains that conclusion.

It is earnestly contended that the complaint does not state a cause of action, for the reason that it appears therefrom that the vein which the defendant in error claims the right to pursue under the surface so conveyed to the plaintiff in error is not the discovery vein, and that there is no allegation that the discovery vein runs in any particular direction, or that its strike would intersect the end lines, or that it runs lengthwise of the claim, rather than across, or that it dips in any given direction, and that for want of these allegations the complaint wholly fails to show a right in the defendant in error to pursue beyond its vertical side lines the vein from which the ores in controversy were taken. It is true that the complaint does not mention the direction of the discovery vein or its dip. It contains the allegation, however, that the defendant in error is the owner of, and in the possession of, the St. Louis quartz lode-mining claim, "and of the quartz, rock, and ore and precious metals contained in any and all veins, lodes, and ledges of mineral-bearing rock, through their entire depth, the tops or apices of which lie within the surface lines of the said fractional portion of said St. Louis lode-mining claim." It describes the mining claim by metes and bounds, and shows that it is about 1,500 feet in length by nearly 600 feet in width. The description closes with these words: "Said lots, Nos. 54 and 55A, extending 1,500 feet in length along said St. Louis vein or lode." It alleges that the strip of land beneath the surface of which the ores in controversy were mined lies east of the east side line of the claim. It alleges that the dip of one of the veins, having a portion of its apex inside of the surface of the St. Louis claim, is to the east, and dips under and beneath the 30-foot strip of the Nine Hour claim, and proceeds to allege that from said vein so apexing within the St. Louis claim, and extending beneath the Nine Hour claim,

the ores in controversy have been taken by the plaintiff in error. No motion or demurrer was filed to the complaint, but the plaintiff in error answered upon the merits.

In Walrath *v.* Champion Min. Co., 19 C. C. A. 328, 72 Fed. 978, this court said:

"The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end lines for such other veins. * * * When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location."

In Del Monte Min. Co. *v.* Last Chance Min. Co., 171 U. S. 89, 18 Sup. Ct. 908, 43 L. Ed. 86, it was said:

"Our conclusions may be summed up in these propositions: First. The location as made on the surface by the locator determines the extent of rights below the surface. Second. The end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third. Every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth. The only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines."

Upon the expressions of the supreme court just quoted, and upon the assumption that the locator of a mining claim has, unless the contrary be shown, complied with the law in locating his claim, the defendant in error contends that the presumption arises that the discovery vein in this instance runs lengthwise with the claim, and not across the same. This contention it is unnecessary here to consider. We find in the complaint the distinct allegation that the defendant in error owns all the precious metals contained in any vein

or lode of mineral-bearing rock, through their entire depth, whose apex is within the surface of the St. Louis quartz lode-mining claim, and the further averment that the ores in controversy were mined from a vein which so apexes within the surface of the claim. These averments are sufficient to show that a cause of action existed, and are sufficient to sustain the judgment.

It is contended that the court erred in refusing to instruct the jury, at the request of the plaintiff in error, that the defendant in error was not in such possession of the vein as to maintain the action of trespass. It is urged that the possession of the apex of the vein in the surface of the St. Louis claim was not the actual possession of the vein, as it extended beneath the surface of the Nine Hour claim. We are able to discover no reason why the actual possession of the surface of a mining claim does not extend to all that belongs to the claim. Such a possession is not constructive, but actual. Said the court in Mining Co. *v.* Cheesman, 116 U. S. 533, 6 Sup. Ct. 483, 29 L. Ed. 713:

"It is obvious that the vein, lode, or ledge of which the locator may have 'the exclusive right of possession and enjoyment' is one whose apex is found inside of his surface lines extended vertically; and this right follows such vein, though in extending downward it may depart from a perpendicular, and extend laterally outside of the vertical lines of such surface location."

In Pardee *v.* Murray, 4 Mont. 234, 2 Pac. 16, it was held that possession of the surface is possession of all veins or lodes whose apices are within such surface lines. Said the court (page 277, 4 Mont., and page 17, 2 Pac.):

"The possession of the respondent was sufficient to maintain this action. * * * Possession of the surface of a mining-claim location is possession of all veins, lodes, and ledges, the tops or apices of which are inside the surface lines, although such veins, lodes, and ledges, as they go downward, may extend outside such surface lines."

The case of Hugunin *v.* McCunniff, 2 Colo. 367, cited by the plaintiff in error, does not sustain his contention. In that case the defendants had conveyed a mine, and delivered a shaft and level in the mine to the vendor of the plaintiffs, retaining a certain other shaft and level in the same lode, not connected with the first. The defendants afterwards took ore from the level and shaft, which they retained. In

trespass for the ore so taken, it was held that the plaintiffs had not the actual or the constructive possession of the place from which the ore was taken, for the reason that, throughout the length of the level retained by them, the defendants had actual possession, extending to all depths and levels from the surface to the center of the earth.

Error is assigned to the refusal of the court to instruct the jury not to include in their verdict the value of certain ores which had been mined, but which had been stored by the defendant therein, under an injunction issued in the action enjoining it from "disposing of, treating, and reducing any ores heretofore removed or extracted from said premises," for the reason that such ores were held subject to the order of the court, and had not been converted to the use of the defendant. There is nothing in the pleadings or in the bill of exceptions to show that such ores had been returned or tendered to the defendant in error, or in any way accounted for; nor was evidence offered for the purpose of definitely fixing the value of such ore, so that the court could have properly instructed the jury to take the same into account. It was for the plaintiff in error, if it desired to have the value of such ores deducted from the amount of the verdict, to have caused the record to show that the ores were offered to, or were left in the possession of, the defendant in error, and to have submitted evidence of their value. But there is another answer to this contention of the plaintiff in error. Although the instruction which was so requested was refused by the court, it does not appear from the bill of exceptions that the court did not, in its charge to the jury, fully and properly instruct upon that branch of the case. The bill of exceptions does not purport to contain all of the charge of the court. It recites but two instructions, and says that the court, "among other things," so instructed the jury. Considering the whole record and all the assignments of error, we find no ground for reversing the judgment, and it is accordingly affirmed.

104 F. Rep., 664.

ST. LOUIS MIN. & MILL. CO. OF MONTANA
v.
MONTANA MIN. CO., LIMITED.

(Circuit Court of Appeals, Ninth Circuit. October 8, 1900.)

No. 594.

1. MINING CLAIMS—SIDE AND END LINES—SECONDARY VEINS.—Where the end lines of a mining claim have been established, they remain the end lines as to all veins found within its surface boundaries.
2. SAME—EXTRALATERAL RIGHTS—VEIN CROSSING COMMON SIDE LINE AT ANGLE.—When a secondary or accidental vein crosses a common side line between two mining claims at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, inasmuch as neither statute nor authority permits a division of the crossing part of the vein the rights of the parties will be determined by the priority of location, and the entire vein considered as apexing upon the senior location until it has wholly passed beyond its side line, without regard to the direction in which the vein dips.

Ross, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Montana.

This is an action originally brought by the St. Louis Mining & Milling Company, a Montana corporation, plaintiff in error, in the circuit court of the United States for the district of Montana, to recover damages for trespass, and the value of certain ores alleged to have been wrongfully appropriated and taken by the Montana Mining Company, Limited, a corporation of Great Britain, defendant in error. After trial by a court and jury, resulting in a verdict for the plaintiff in error in the sum of $23,209, plaintiff in error now brings the suit to this court upon certain assignments of

error, which, it alleges, deprived it of a larger verdict. There is practically no contention between the parties as to the facts. The plaintiff in error is the owner of the St. Louis mining claim, situated near Marysville, in the state of Montana; and the defendant in error owns the Nine Hour mining claim, adjoining the St. Louis claim on its easterly side. The St. Louis claim is the older location. It contains two veins, known in the record as the Discovery vein and the Drum Lummon vein. The accompanying map gives the general location of the two claims, and all details of description which need be considered in this opinion:

By way of explanation of the map, it may be stated that the line, E, C, D, is the dividing line between the two claims. The line marked "133-foot plane" is a projected line plane parallel to the southerly line of the St. Louis claim, and 133 feet southerly from the point, C, on the line, C, E. The line marked "108-foot plane" is a similar plane 108 feet from the said point, C, and the line marked "520-foot plane" is a similar plane 520 feet southerly from the northeasterly corner of the St. Louis claim on the line, D, C. The strip of land included within A, B, C, E, is a strip 30 feet wide, called in the record the 30-foot or compromise strip. The arrows show the direction of the dip of the vein to be eastwardly, and underneath the Nine Hour claim. The Discovery vein is not shown upon the map, but it is established by the evidence to have a northeasterly and southwesterly trend, following generally the length of the claim as located. As to the Drum Lummon vein, there is a discrepancy between

the complaint and the evidence. The complaint alleges that it enters the easterly line of the St. Louis claim at the point, H, or the 520-foot plane, and departs from the claim at the 133-foot plane at F. The evidence shows a different state of facts, to the extent that it appears therefrom that more of the Drum Lummon vein is within the St. Louis claim to the north, and that the foot wall does not pass out of the St. Louis claim until a considerable distance southerly of the 133-foot plane, if it does at all. But the case will be considered as if the vein were located according to the allegations of the complaint (and the map so shows it), as the assignments of error herein are based upon such an assumed state of facts. Upon the trial of the cause, the plaintiff in error claimed the right to pursue the Drum Lummon vein extralaterally so long as any part of the apex of the vein was within the boundaries of the St. Louis claim. The defendant in error denied this right in toto, basing such denial upon the following state of facts: When the predecessors in interest of the plaintiff in error applied for a patent to the St. Louis ground, they included the so-called 30-foot strip shown upon the map in the claim. The owners of the Nine Hour claim opposed the issuance of the patent so far as this strip was concerned, asserting that it was a part of the Nine Hour claim. A compromise was entered into, by which the owners of the St. Louis claim agreed to convey to the owners of the Nine Hour claim, upon their receiving a patent, the said 30-foot strip; and this was afterwards done, after suit had been brought for specific performance of the contract. The defendant in error claimed that by this deed, owing to its language and the nature of the transactions leading up to it, the plaintiff in error was foreclosed of the right to pursue the Drum Lummon vein under the said 30-foot strip. The trial court permitted evidence of the value of ores alleged to be appropriated by the defendant in error from the vein as it passed under the Nine Hour claim and the 30-foot strip, between the 520-foot plane and the 108-foot plane, to go to the jury, and charged the jury that the effect of the proceedings had was to make the 30-foot strip a part of the original Nine Hour claim, and that the defendant in error had the same rights therein, and no further rights, than as if it had been originally patented as a part of the Nine Hour claim, and further charged the jury that the line, E, C, was a side line common to the two claims, and that, so long as the Drum

Lummon vein apexed entirely within the St. Louis claim, the plaintiff in error could follow it in its dip under the Nine Hour claim, including the 30-foot strip. Upon this the jury rendered a verdict in favor of the plaintiff in error for the sum of $23,209. A writ of error was sued out by the defendant in error to this court, and this court, in Montana Min. Co. *v.* St. Louis Min. & Mill. Co. (C. C. A.) 102 Fed. 430, sustained the lower court upon these propositions as submitted to the jury, holding the line, E, C, D, as shown upon the map, to be a boundary line between the two claims and a side line of each claim, and granting the plaintiff in error here the right of lateral pursuit under both the 30-foot strip and the remainder of the Nine Hour claim. Hence in this opinion the 30-foot strip will not be treated separately, but will be regarded as part and parcel of the Nine Hour claim. Upon the trial, however, the plaintiff in error further offered evidence to show the value of ores alleged to have been appropriated by the defendant in error, contained in the said Drum Lummon vein between the 108-foot plane and the 133-foot plane. This offer was made—First, as to the portion of the vein between said planes underneath the 30-foot strip; and, secondly, as to the portion thereof under the Nine Hour claim to the easterly of the 30-foot strip. But, for the purpose of applying the principles of law which will control here, these two offers may be considered as one, in accordance with the decision in 102 Fed. 430, *supra*. The court sustained objections to the evidence offered, and, upon assignments of error based upon these rulings, the case is now before this court.

Arthur Brown, H. P. Henderson, E. W. Toole, and T. C. Bach, for plaintiff in error.

W. E. Cullen, E. C. Day, and W. E. Cullen, Jr., for defendant in error.

Before Gilbert, Ross, and Morrow, Circuit Judges.

MORROW, *Circuit Judge* (after stating the facts as above):

The assignments of error raise but one question which need now be passed upon, all others having been adjudicated upon the writ of error of the defendant herein, in the case of Montana Min. Co. *v.* St. Louis Min. & Mill. Co. (C. C. A.)

102 Fed. 430. The question for present consideration is: When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within the other, to whom does such portion of the vein belong? This question does not appear to have ever been directly passed upon by the courts. But, while it is not entirely free from difficulty, the application of well-established principles of law thereto should conclusively determine the question. Two important elements enter into the consideration of mining rights: First, the surface boundaries, defining the rights acquired by reason of a vein or veins apexing within such boundaries; and, second, the extent of underlying mineral deposits attaching to such surface rights.

The defendant in error contends that it is entitled to the vein in its entirety in depth to the easterly of a vertical plane drawn through the line, E, C, upon the theory that the said line is an end line so far as the Drum Lummon vein is concerned, or, if it be determined that the line, E, C, is a side line, that it is entitled to the entire vein in depth to the southerly of the 108-foot plane.

As to the first contention, it is a well-settled proposition that a mining claim can have but two end lines, and that, end lines having been once established, they become the end lines for all veins found within the surface boundaries. Iron Silver Min. Co. *v.* Elgin Min. & Smelt. Co., 118 U. S. 196, 207, 6 Sup. Ct. 1177, 30 L. Ed. 98; Walrath *v.* Champion Min. Co., 171 U. S. 293, 307, 18 Sup. Ct. 909, 43 L. Ed. 170. This court has already determined that the line, E, C, D, is a side line common to the two claims (102 Fed. 430), and therefore it cannot be considered an end line for the Drum Lummon vein.

The second contention of the defendant in error involves the construction of section 2322 of the Revised Statutes. That section provides:

"The locator of a mining location * * * shall have the exclusive right to possess and enjoy * * * all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically."

The defendant in error maintains that the words "top or apex" cannot be construed to mean "top or apex or any part

thereof," and that, under the strict construction necessary, extralateral rights would not follow when the whole of the apex was not within the surface lines. If this be the correct view of the language of the statute, manifestly neither party herein would be entitled to pursue the vein in depth between the 108-foot plane and the 133-foot plane, since the apex of the vein between those points, while crossing the side line, is not wholly within either claim. For the purposes of illustration, suppose the vein were regular and vertical for the 25 feet between the two planes mentioned, crossing the side line at the same angle. The boundary rights between the parties could not then be determined by the application of a vertical plane extending to the center of the earth along the side line, and 25 feet in horizontal width, since that would be constructing an end line to that extent, and there is no authority in the statute or in the decisions for any such action. It might be said that the vein could equitably be cut by a plane parallel with and midway between the 108 and 133-foot planes, thus bisecting the portion of the vein in controversy, and giving half of the disputed ground to each claim. But neither is there any authority for such a determination by the court. It would seem, therefore, that by some rule the entire 25 feet should be construed to apex in one of the locations. And as, where the rights of two mining locators are apparently equal with respect to mining ground, the element of priority of location is controlling, preference being generally given to the senior locator (Argentine Min. Co. *v.* Terrible Min. Co., 122 U. S. 478, 484, 7 Sup. Ct. 1356, 30 L. Ed. 1140), the entire vein would be given to plaintiff in error. If this be the true doctrine when a vein is vertical, why should there be any change in its application when the vein dips? The right of lateral pursuit is a right conferred by statute. It does not depend upon circumstances, and is as absolute as the ownership of a vein apexing within the surface lines, save that it ceases when and at the point that it interferes with the statutory rights of another. In other words, the determination of a rule, and its application to the case before the court, should be the same whether the vein dips towards the junior location or towards the senior location, or does not dip at all. The defendant in error, in support of its contention that the right of extralateral pursuit only remains so long as the entire vein is within the claim, cites the case of Fitzgerald *v.* Clark,

17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803, the decision in which was affirmed by the supreme court of the United States. 171 U. S. 92, 18 Sup. Ct. 941, 43 L. Ed. 87. But the question here involved was not there considered. It appears that in that case no attention was given to the width of the vein, its crossing of the side line being regarded merely as a point. No mention whatever was made of the width of the vein or of its apex. Reference is also made by the defendant in error to adjudications upon the class of veins called "split veins." But the case under review does not involve a split vein, and a different principle must apply. If, then, in construction of law the vein for the 25 feet in controversy must be either upon the one location or the other, and if the senior locator has priority of title, it would follow that the right of lateral pursuit would remain with the senior locator within a plane parallel to the end line of the senior claim, and up to the point of departure of the apex, or in this case the footwall. It may be said that the application of this rule will sometimes work hardship. It is true that hypothetical cases may be assumed, which, as individual types, may present difficulties in equitable adjudication. But the application of principles sanctioned by judicial authority furnishes the most effective solution of such problems, and will undoubtedly reduce the seeming inequities to a minimum.

Upon the question first propounded in this opinion, therefore, the only deduction which can be made from the foregoing views is that inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side line. It follows that the court below erred in its refusal to admit the evidence offered as to the value of ores taken from the Drum Lummon vein on its dip between the planes designated as the 108-foot and 133-foot planes, and the cause is therefore remanded for a new trial as to damages alleged and recovery sought for conversion of ore between the planes indicated.

Ross, *Circuit Judge:*

I dissent. The case of Montana Min. Co. *v.* St. Louis Min. & Mill. Co. (C. C. A.) 102 Fed. 430, referred to in the foregoing opinion, affirmed the existence of extralateral

rights in respect to a vein that enters and departs from a side line only of a mining claim, and the judgment in the present case affirms such right on the authority of the decision in the former case. Yet in neither is the point at all discussed by the court, and in the opinion in the former case there is not a word said from which it can be seen that any such point was presented for decision. 102 Fed. 430. The importance of the question, not only to the correct determination of the present case, but in respect to other mining claims, is too manifest to require comment. In the former case a petition for rehearing is now pending, and I think it should be granted, and that case, together with the present one, set down for reargument, to the end that the question as to whether any extralateral rights exist in respect to any vein that enters and departs from a side line, only, be discussed by counsel, and fully considered by the court, before final determination.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

v.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

CHAS. J. HUGHES, JR.,
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ALDIS B. BROWNE,
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SUPREME COURT OF THE UNITED STATES.

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THE MONTANA MINING COMPANY, LIMITED,
PLAINTIFF IN ERROR,

v.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA.

REPLY TO BRIEF FOR DEFENDANT IN ERROR.

Defendant in error now seeks to repudiate its own complaint and the averments found therein, pleading its alleged ownership of a certain vein or lode underneath the surface owned by plaintiff in error, the latter's wrongful entry and trespass thereon, and the damage alleged by such trespass and conversion of the ores found in such vein. Notwithstanding these were all essential averments to an action for trespass and conversion, the allegation now is that the action was one solely for conversion of ore, was transitory and not local, and hence all statements in its complaint affirmatively pleading its possession and source of ownership should *now* be rejected in determining the question of jurisdiction in this court to review the judgment below.

We answer:

The original complaint (Supp. Rec., 4–5) avers that the defendants "wrongfully, unlawfully and willfully entered upon" the vein claimed by plaintiff, and concludes:

> "Wherefore plaintiff prays judgment against said defendants for said sum of $200,000, *damages sustained by reason of the trespass aforesaid,* together with its costs in this behalf expended."

Both the first and second amended and supplemental complaints (Supp. Rec., 13, and Rec., 4) aver that the defendant entered thereon "knowingly, wrongfully and unlawfully," &c., and pleads damage for the wrongful removal and conversion of the ore, &c. Each complaint averred that the defendant had removed and was *continuing* to remove the ores, &c.

It is hence clear that the action was treated as a continuing trespass. In its original decision in this case (102 Fed. Rep., 430), Appendix to Brief, pages 8 and 9, that court so expressly rules, with citation of authorities. In the brief of defendant in error filed in that court in this cause, at page 14, there is the express statement that—

> *"The action is one of trespass on real estate and for damages resulting from the trespass. And the complaint in such an action would be similar to one in ejectment."*

And this is followed by citations of the Montana Code and decisions of its Supreme Court thereunder, with others, to fortify such contention.

And Mr. Lindley, in his work on Mines, second edition, volume 2, section 865, states in concise language the general practice in cases of this kind throughout the mining States thus:

> "SEC. 865. INTRODUCTORY.—In the mining regions of the West the action of trespass is largely utilized, not only for the purpose of recovering damages

> for the unlawful extraction of ore, but also to try the title itself, for, as a rule, the title to the property or some portion of it is involved in the litigation. The frequency with which this class of actions is encountered in the reports of the mining States is due to that feature of the Federal law which permits the owner of a mine or mining claim holding within his surface boundaries the apex of a vein, to pursue such vein under certain conditions, into and underneath the land adjoining. So while the action is in form trespass *quare clausum fregit*, the issues naturally arising are those of ownership of the segment of the vein in dispute, and title is necessarily brought into question. The 'law of the apex' is responsible for nine-tenths of the expensive litigation arising in the conduct of quartz or vein mining, and out of it have grown several interesting and novel questions. The rules governing the action in the case of underground invasion are the same, generally speaking, as where a surface trespass is committed. There are, however, certain elements in cases of underground trespasses deserving of special consideration."

Manifestly, then, plaintiff sued in trespass. Its subsequent amendments did not change the nature of its cause of action. The law of Montana provides:

> "That the common law of England, so far as the same is applicable and of a general nature, and not in conflict with the special enactments of this Territory, shall be the law and the rule of decision, and shall be considered of full force until repealed by legislative authority."
>
> *Act of June 2, 1872.*

In *Ellenwood v. Marietta Chair Co.*, 158 U. S., 105, 107, this court held:

> "By the law of England, and those of the States of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like

an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the State in which the land lies *(Livingston v. Jefferson,* 1 Brock., 203; *McKenna v. Fisk,* 1 How., 241, 247; *Northern Indiana Railroad v. Michigan Central Railroad,* 15 How., 233, 242, 251; *Huntington v. Attrill,* 146 U. S., 657, 669, 670; *British South Africa Co. v. Companhia de Mocambique* (1893), App. Cas. 602; *Cragin v. Lovell,* 88 N. Y., 258; *Allin v. Connecticut River Co.,* 150 Mass., 560; *Thayer v. Brooks,* 17 Ohio, 489, 492; *Kinkead's Code Pleading,* par. 35).

"The original petition contained two counts, the one for trespass upon land, and the other for taking away and converting to the defendant's use personal property; and the cause of action stated in the second count might have been considered as transitory, although the first was not *(McKenna v. Fisk,* above cited; *Williams vs. Breeden,* 1 Bos. & Pul., 329).

"But the petition, as amended by the plaintiff, on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the timber was incidental only; and could not, therefore, be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate *(Cotton v. United States,* 11 How., 229; *Eames v. Prentice,* 8 Cush., 337; *Howe v. Willson,* 1 Denio, 181; *Dodge v. Colby,* 108 N. Y., 445; *Merriman v. McCormick Co.,* 86 Wisconsin, 142). The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could not be maintained in Ohio."

In *Stone v. United States,* 167 U. S., 178, cited in support of the pending motion, the conversion was *complete*

and the suit was to recover the value of the timber manufactured or lumber and ties taken. Hence the court held the action transitory. Here the complaint and each amendment thereto averred the continuing trespass and conversion, a condition precisely analogous to that in *Ellenwood v. Marietta Chair Co., supra.*

And such is the ancient law on which the present rule and decisions are founded; for in Third Blackstone's Commentaries, page 210, the learned commentator says:

> "Every unwarrantable entry on another's soil the law entitles a trespass *by breaking his close;* the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit.* For every man's land is, in the eye of the law, inclosed and set apart from his neighbor's; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz., the treading down and bruising his herbage.
>
> "One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass; or, at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land."

And again, page 212:

> "In trespasses of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle), the declaration may allege the injury to have been committed by *continuation* from one given day to another (which is called laying the action with a *continuando),* and the plaintiff shall not be compelled

> to bring separate actions for every day's separate offense, but where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando;* yet, if there be repeated acts of trespass committed (as cutting down a certain number of trees) they may be laid to be done, not continually, but at divers days and times within a given period."

Hence the complaint, in present action, in averring a continuing trespass, was in exact accord with the existing and settled rule.

And in the Stone case, *supra*, the court cites with approval the language found in *Schulenberg v. Harriman*, 21 Wall., 44-64, that—

> "All the remedies were open to the owner which the law affords in other cases of the wrongful removal or conversion of personal property."

The plaintiff in this action (defendant in error here) hence clearly elected to bring suit in trespass and is bound thereby. Even had the action been in trover, the averments of the complaint were in every sense proper, for in *Enc. of Pl. & Pr.*, volume 21, page 1065, title *"Trover and Conversion,"* the rule is stated thus:

> "The rule is that the plaintiff may, if he choose, without undue prolixity, allege the facts showing his ownership and right to possession." * * *

And again, page 1062:

> "It may be stated as a general rule that in an action of trover the declaration or complaint must allege that the plaintiff had at the time of the conversion a general or special property in the goods converted to the possession or right of possession."

Hence it is manifest that the plaintiff (defendant in error here), whether suing in trespass or trover, properly stated the facts which presented the concededly Federal questions on the face of its complaint, and in practical effect and with relation to the peculiar averments necessary in an apex case brought its action within the clear effect of the rule and practice stated by Mr. Lindley, *supra*. These Federal questions, which were also fully argued at the bar, are stated in our Brief at pages 4-5, 58-60, 91-95, 102, 138-153, and in "Reply Brief of Petitioner" in No. 13, original, at pages 4-7.

In actions in trespass such as this is, where extralateral rights are involved or constitute the basis of the plaintiff's action, two different cases may be presented, one where the plaintiff owns the claim beneath the surface of which the trespass has been committed, and the other where the alleged trespass has been committed beneath the surface of the claim of another—or at least outside the surface of the plaintiff's claim—but it is asserted that the vein is owned by the plaintiff by virtue of the existence of the apex thereof within his claim.

In the first case it is sufficient, in the complaint, to allege the ownership of the claim and the commission of the trespass within it (as illustrated in *Boston, etc., Mining Co. v. Montana Ore Company, infra*) without going into other matters, since the presumption is that the plaintiff, owning the surface of the claim from which the ore is taken, owns the ore beneath it, while in the second case it is the practice —and a proper and necessary one—that the plaintiff shall allege in the complaint that he owns his claim, and also the position and extent within it of the apex of the vein, having such relation to the boundaries of the claim as secure the extralateral right under the statute.

This is stating the facts upon which the right depends. Necessarily, in stating the *locus in quo* of the trespass, which must be alleged in the complaint, it is disclosed that

the alleged trespass is committed outside the surface boundaries of the plaintiff's claim, and therefore, to show his title thereto, he must allege the facts upon which the extralateral rights are based and apply the statute thereto, which being done in this case presents, in the affirmative statement of the facts constituting the plaintiff's case, the existence of the Federal questions now conceded to be presented by the complaint as it stands.

This is the universal practice in complaints of this kind, as exhibited in this case and all the apex cases in which the plaintiff bases his action on the taking of ores beyond his surface boundaries.

The rule that the plaintiff cannot, by attempted statement of the defense, *thereby* create Federal jurisdiction is inapplicable, for that is not attempted. The complaint and its amendments here are confined *solely* to the affirmative statement of the plaintiff's case, and in no sense do its allegations set forth the defendant's case. The plaintiff elected to and did sue in trespass, set out its asserted title and claim, and distinctly plead the defendant's wrongful and unlawful entry.

In *Boston, &c., Mining Co. v. Montana Ore Co.*, 188 U. S., 632, 638, cited in support of the pending motion, it was said:

> "To make out a *prima facie* case on the part of complainant, so far as its right to the ore in question is concerned, all that was necessary was to show the patent and the complainant's possession under it, and from such patent and possession the presumption would be that the complainant was the owner of all ores found within the boundaries contained in the patent extended downward into the earth, and the burden would then rest upon the defendants to show that, notwithstanding such presumption, they had the right to enter upon and take the ore from the ground within the limit described in the patent under which the complainant

derives title. It could then prove facts to sustain its averments in regard to ascertaining the quantity and value of the ores which the defendants were extracting or might extract from the complainant's premises, and that it would be altogether uncertain and indefinite as to what amount of ores or the value thereof the defendants might extract in the future, and that the complainant would be compelled to rely upon the good faith and showing of the defendants as to the amount and value of the ores which they had theretofore extracted and might thereafter extract from the premises. Indeed, the complainant asserted in the bill, an extract from which is contained in the foregoing statement, that *prima facie* it is the owner of all ores found within its boundaries extended downward into the earth, until the contrary has been shown. It would be wholly unnecessary and improper in order to prove complainant's cause of action to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading so far as we are aware, and is improper."

But this is the exact *converse* of the case at bar. *Here* the plaintiff was not the holder of the patent title to the land. That was in the defendant (the plaintiff in error here). The contention and pleading of the plaintiff was that, notwithstanding this, the plaintiff was the owner of the ore in question because the vein wherein it was contained had its claimed apex *in part* upon *other* land which the plaintiff did own. That contention was and is its sole ground of action, and in stating it the plaintiff necessarily stated a claim based upon the Federal mining law, for apart from *that* law the plaintiff had no cause of action.

That allegation was denied in the answer (Rec., 7) and was followed by the further and separate defense of estoppel (Rec., 8). Manifestly this raised an issue upon plaintiff's own statement of its own case as one arising under and dependent for its maintenance upon the construction of a Federal statute as applied to the facts there pleaded by the plaintiff.

II.

For the convenience of the court we here note references to the record and our brief in connection with the several points involved and argued:

1. *The Specific Performance Case and Resulting Judgment and Deed.*

Bond for conveyance (Ex. "A," Rec., 9 and 45).

Deed thereunder (Ex. "B," Rec., 11).

Judgment-roll (Complaint, answer, findings, and judgment) (Rec., 41-54).

Assignment of errors thereon 5, 8-15 (Brief, 33, 37).

Assignments 28, 29, 30 (Brief, 44, 45).

Assignments 36, 37, 40, 41, 42, 43, 44, 45, 46, 47.

Discussion (Brief, 103-137, 153-163).

The Specific Performance case (Rec., 44) especially plead:

> "And plaintiff further alleges that the said defendants have conspired and confederated together for the purpose of cheating, wronging and defrauding this plaintiff out of the said premises, and to that end the said defendant, and the St. Louis Mining and Milling Company of Montana have instituted a number of suits in the Circuit Court of the United States within and for the District of Montana, in which it claims that it is the owner of the premises above particularly described by virtue of the deed so wrongfully and fraudulently made, executed and delivered to it by

its said codefendant, as aforesaid, and in which said actions it claims the right to recover large sums of money for ores therein alleged to have been wrongfully mined from said premises by this plaintiff; *that in order to successfully defend itself against said suits and in order to remove the cloud from plaintiff's title to said premises caused by the execution of the said deed to the said defendants, The St. Louis Mining and Milling Company of Montana,* it is necessary that the said defendants should be compelled to make, execute and deliver to this plaintiff a deed for the said premises, as in equity and good conscience they ought to do."

The trespass suit now at bar was the suit thus referred to. The defendants denied obligation to make any deed and plead the statute of limitations. The case was tried by the court without a jury, and the findings therein (Rec., 50-52) distinctly declare, upon the evidence, that the plaintiff (The Montana Company) was the successor in interest of the obligees under the bond on which the suit was based; that said company was the assignee thereunder (Findings 7, 8, 9, Rec., 51-52); that the St. Louis Company took with notice "of the equities of the plaintiff in and to said compromise strip and its possession thereof."

As conclusions of law the court held plaintiff entitled to a conveyance of the fee, and—

"II.

"That the said defendants, and each of them, should be enjoined and perpetually restrained from asserting any right, title, or interest *of any kind or character in or to the said compromise ground, or any part or portion thereof,* and from in any manner interfering with the possession or enjoyment thereof by plaintiff."

Rec., 52.

And the judgment (Rec., 53-54) recites "that the agreement set forth in the complaint herein, a copy whereof is attached to said complaint as an exhibit, *be specifically performed,*" and that the defendant execute a deed in form like the form attached to the judgment within thirty days, or, failing so to do, the clerk of the court was authorized to make the conveyance for it.

The judgment and resulting deed conclusively show that there was transferred to the plaintiff (plaintiff in error here) by such deed the entire estate of the St. Louis Company in this compromise ground by words so full, sweeping, and conclusive as to leave no possible interest in the grantor. Language could not more effectually transfer the ownership of land with all its contents, from the surface downward, than is thus here used in the judgment and the deed. Add thereto the injunctive language of the judgment, and the purpose is complete.

With notice from the complaint in the Specific Performance case that the Montana Company sought the legal title to this ground, "with all the mineral therein contained," we find the defendant in that case (The St. Louis Company) interposing no defense even hinting at any claim of apex rights *outside* the compromise ground which would give it the right to take from the compromise strip all the mineral therein contained, which was the real purpose and object of the damage suit then pending and now at bar.

Manifestly the pleadings in the Specific Performance case put in issue the right to the fee of this compromise strip "and all the mineral therein contained." The resulting judgment and deed was intended to and did vest in the Montana Company all and every right which the St. Louis Company had in that ground and the waiver of adverse claim gave the St. Louis claimant the much larger area of the controversy and which includes the apex of the vein here involved. Hence the contention it here makes was clearly matter *res adjudicata* and rendered the estoppel so made a complete bar.

The contention that the Montana Company and its predecessors in interest treated this compromise strip as Nine Hour ground is not material here. They claimed almost two acres of the St. Louis claim as applied for as Nine Hour ground and brought adverse claim and suit accordingly.

The bond for deed treated the ground included therein as both St. Louis and Nine Hour, in express words (Rec., 9-10). The obligor agreed, however, to obtain the fee from the United States and convey the compromise strip, with all its contents, to the obligees or their assigns. As against the obligor, his acceptance of patent to this ground, as part of the St. Louis claim, estopped him from asserting that it was otherwise than St. Louis territory, because that was the legal effect of the waiver and withdrawal of the adverse claim. As he is estopped to deny that result, it is manifest the Montana Company cannot be bound to the contrary, as estoppels must be mutual. The St. Louis is the fee title; the Nine Hour the possessory title. A statement in the pleadings that the compromise strip was treated as Nine Hour ground by the Montana Company is not material, because that was the basis of the adverse claim suit for the entire conflict, and as well the basis of the compromise whereon the bond for deed was given from the St. Louis claimant.

Certainly both parties intended that the legal title under the St. Louis patent should come to the obligees of the bond and their assigns. It is equally certain that the result of the compromise, whereby the Nine Hour claimants surrendered the area within their claim, many times larger than that deeded to them under the St. Louis patent, cannot now be held to defeat the legal rights of the Montana Company in this ground simply by mere use of words.

2. *Extent of Conflict Shown by Adverse Claim of Nine Hour 1.98 Acres.*

a. Record, 55-59, 65; plat of Nine Hour patent, opposite Record, page 76.

Map, Exhibit "E," Brief, opposite page 19, and note, page 19.

Assignment of error 15, Brief, 37; discussion, Brief, 125, 126.

3. *Westerly Line of Compromise Ground as Conveyed by Bond and Deed 9½ Feet West of Line Assigned to the Compromise Ground by Defendant in Error.*

The court refused to admit evidence showing the real position of the ground conveyed by the deed, which was 9½ feet west of the west line of the compromise ground, as indicated on defendant in error's maps and as fully explained at the oral argument by reference to the maps and variations in the courses between the bond and deed giving the description as it was on the application for patent when the compromise was made and the lines in the patent as finally issued. The effect was to incorrectly locate the actual position upon the ground of the compromise strip, and thus to prevent the inclusion therein of the entire apex containing all the ore in controversy here.

Record, 55; assignment of error 8, Brief, 32.

Discussion, Brief, 17 and 18 (*i* and *k*); map opposite page 19.

4. *Extralateral Rights in Apex Vein.*

Assignment of errors 4, 6, 33-37, 41-48, Brief, 30, 31, 40-42, 52-54.
Discussion, Brief, 102, 138-153.
Priority, Brief, 153-163.

5. *Complaint Does Not State a Cause of Action.*

Assignment of errors 2, Brief, 2.
Discussion, Brief, 81-96.

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SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

Motion of
Motion to Dismiss.

MOTION TO DISMISS, NOTICE, AND BRIEF IN SUPPORT OF MOTION.

M. S. GUNN,
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J. H. RALSTON,
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SUPREME COURT OF THE UNITED STATES.

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THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

Notice of Motion to Dismiss.

MESSRS. W. E. CULLEN, C. J. HUGHES AND A. B. BROWNE,
Attorneys for Plaintiff in Error:

Please take notice that the defendant in error will, on Monday, the 10th day of December, 1906, at the hearing of the above-entitled cause, move the Court to dismiss the writ of error in said cause. The motion which will be made and brief in support of same are hereto attached.

Dated this 4th day of December, A. D. 1906.

M. S. GUNN,
ARTHUR BROWN,
J. H. RALSTON,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.
} *Motion to Dismiss.*

Comes now the defendant in error in the above entitled cause and moves this court to dismiss the writ of error herein for the reason that the jurisdiction of the circuit court was dependent entirely upon the fact that the plaintiff in error is an alien and the defendant in error a citizen of the United States, on account of which the judgment of the Circuit Court of Appeals in and for the Ninth Circuit, in said cause, is final.

Dated this 6th day of December, 1906.

M. S. GUNN,
ARTHUR BROWN,
J. H. RALSTON,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

THE MONTANA MINING COMPANY, LIMITED, *Plaintiff in Error*, *vs.* THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, *Defendant in Error*.	*No. 402.*

BRIEF IN SUPPORT OF MOTION TO DISMISS.

The purpose of this action is to recover the value of certain ore, which was owned and possessed by plaintiff, defendant in error in this court, and converted by defendant, plaintiff in error here, to his own use.

Stone v. *United States*, 167 U. S. 179.

The case just cited was for the recovery of the value of trees cut upon the public domain. In the opinion the Court said:

> "It is contended in behalf of Stone that as the lands from which the trees were alleged to have been unlawfully cut are in Idaho, the action is local to the state, and the district court of the United States for the district of Washington was without jurisdiction. *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105, is cited as an authority for this proposition. But that case proceeded upon the

theory that the allegations of the petition, at the time it was tried, presented a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the property was incidental only, and, therefore, that the entire cause of action was local. In the present case the petition, it is true, avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The description in the petition of the lands and the averment of ownership in the United States were intended to show the right of the government to claim the value of the personal property manufactured from the trees illegally taken from its lands."

In the case at bar the plaintiff does not make any claim for damages because of the trespass, but judgment is demanded for the value of the ore, which it is alleged was converted by defendant.

The case was tried upon the theory that it is an action to recover the value of ore converted. This appears from the evidence introduced and from the instructions to the jury as to the measure of damages.

The statutory law of the State of Montana requires that the complaint shall contain "a statement of the facts constituting the cause of action, in ordinary and concise language." *Code Civ. Proc.*, sec. 671. This was also the law when the action was commenced. *Comp. Stats.*, div. 1, sec. 85.

The law of a state relating to the pleadings in a case applies to actions at law in the Circuit Court of the United States for such state. Sec. 914, *U. S. Rev. Stats.*

The statement of the claim or cause of action of the plaintiff required the following allegations: (1) Ownership and possession of the ore by plaintiff, (2) conversion of such ore by defendant, and (3) the value of the ore. All other allegations are surplusage. The allegation of ownership is the allegation of an ultimate fact. The source of title is a matter of evidence.

If the plaintiff had, in stating its claim or cause of action, alleged ownership and possession, instead of pleading the

evidence from which ownership and possession are inferred, and, upon the trial, when the evidence was introduced, the defendant had demurred to the evidence or moved for a nonsuit, and the decision of such demurrer or motion had involved the decision of a federal question, the judgment of the Circuit Court of Appeals would undoubtedly have been final. Can a party, by pleading evidence, in violation of the law of pleading, introduce into the statement of his claim or cause of action a federal question which would not otherwise appear in the case until the answer is filed or a trial is had, and thereby secure the right to invoke the jurisdiction of this court? The act of congress conferring jurisdiction upon this court was framed with reference to the rules of pleading prescribed by law. The jurisdiction of this court depends upon the statement of the plaintiff's claim in the mode required by the law of pleading. If this were not true, the parties might agree that the plaintiff would, in stating his claim, state the evidence in support of the claim made and the facts relied upon as a defense, and thereby confer jurisdiction upon this court over a case in which the federal question would otherwise be presented by the answer or at the trial. If such a practice is permissible, it must be admitted that jurisdiction can be conferred by consent of the parties.

Many attempts have been made to bring cases within the jurisdiction of this court by incorporating into the pleading from which the question of jurisdiction must be determined, allegations which were not necessary to the statement of the plaintiff's claim, but they have all been unsuccessful.

In the opinion in the case of *Joy* v. *St. Louis*, 201 U. S. 332, it is said:

> "The case is a pure action of ejectment, and the general rule in such actions, as to the complaint, is, that the only facts necessary to be stated therein, are, that the plaintiff is the owner of the premises described, and entitled to the possession, and that defendant wrongfully withholds such possession, to the plaintiff's damage in an amount stated. Setting out the source of the plaintiff's title, as was done with so much detail in this case, was unnecessary, but it does not alter the case, because a

claim that the title comes from the United States does not, for that reason merely, raise a federal question.

"It is a long-settled rule, evidenced by many decisions of this court, that the plaintiff can not make out a case as arising under the constitution or laws of the United States unless it necessarily appears by the complaint or petition or bill in stating plaintiff's cause of action. In *Little Fork Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199-203, it was said that before the circuit court can be required to retain a case under its jurisdiction, under section 5, act of 1875, it must, in some form, appear upon the record, by a statement of facts in legal and logical form, such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the constitution, or some law or treaty of the United States. That was a case of a petition for a removal of a suit from the State to the federal court But it has been held that whether there is a right of removal in such cases depends upon whether the circuit court could have exercised original jurisdiction."

In the opinion in the case of *Boston & Montana Consolidated Copper and Silver Mining Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 632, it is said:

"It is quite plain that the various averments contained in the complainant's bill for the purpose of showing jurisdiction in the circuit court are wholly unnecessary in order to make out complainant's cause of action for the conversion of ore by the defendants on premises belonging to the complainant."

In the same opinion it is said:

"The cases hold that to give the circuit court original jurisdiction, the federal question must appear necessarily in the statement of the plaintiff's cause of action, and not as mere allegations of the defense which the defendants intend to set up, or which they rely upon."

In the opinion in the case of *Western Union Telegraph Co.* v. *Ann Arbor Railroad Co.*, 178 U. S. 239, it is said:

"And it must appear on the record, by a statement in legal and logical form, such as is required in good plead-

ing that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground."

In the opinion in the case of *Florida Central & Peninsular Railroad Co.* v. *Bell*, 176 U. S. 330, this court said:

> "It has been several times held by this court that the plaintiff, if the statement of his own claim does not disclose a federal question, can not create jurisdiction in a circuit court by anticipating the defendant's claim and by alleging that the defendant will set up a defense under some law of the United States."

In the opinion in the case of *Third Street Railroad Co.* v. *Lewis*, 173 U. S. 458, it is said:

> "It is thoroughly settled that under the Act of August 13, 1888, the Circuit Court of the United States has no jurisdiction, either original or by removal from a State court of a suit as one arising under the constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim."

See further:

Devine v. *Los Angeles*, 202 U. S. 313.
Empire State, etc. Co v. *Mining Co.*, decided by this court at the October term, 1905.
Boston, etc., Mining Co. v. *M O. P. Co.* 188 U. S. 630.
State of Tennessee v. *Union Planters Bank*, 152 U. S. 453.

The allegation of ownership and possession of the vein from which the ore was extracted was unnecessary, as already shown. This allegation, however, was merely for the purpose of showing ownership and possession of the ore. In the case of *Stone* v. *United States*, 167 U. S. 179, the court, in the opinion, said:

> "The description in the petition of the lands and the averment of ownership in the United States were intended to show the right of the government to claim the value of the personal property manufactured from the trees illegally taken from its lands."

In the case of *Swift* v. *Jones*, 7 N. W. 656, which was an action to recover the value of lumber made from logs cut from the plaintiff's land, the Supreme Court of Wisconsin said:

> "Instead of averring ownership of the lumber directly, the plaintiff avers that it came from the logs cut on his land in the state of Michigan, which is an indirect yet a substantial averment of such ownership; or, in other words, the plaintiff pleads evidence of title to the lumber, instead of the legal conclusion of title from such evidence. Such a pleading is informal and inartistic, but when liberally construed, which is now the rule, it must be held substantially sufficient."

If the action is considered as an action to recover damages for the trespass upon the vein, it was not necessary to allege ownership and possession of the mining claim. The statement of ownership and possession of the mining claim, and that the vein has its apex within the surface boundaries of such claim is a statement of matters of evidence in support of the allegation of ownership and possession of the vein. But however this may be, the alleged federal questions are disclosed by the description of the vein with reference to the mining claim. It was wholly unnecessary, in stating the plaintiff's claim, to describe the vein by describing the apex thereof with reference to the surface boundaries of the mining claim. The allegation that the section of the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis claim, in connection with the allegation of ownership and possession of the St. Louis claim, would be a sufficient description and statement of ownership and possession of the vein.

Montana Mining Co. v. *St. Louis Mining & Milling Co.*, 102 Fed. 430.
Mining Co. v. *Cheesman*, 116 U. S. 533.

The plaintiff in its complaint in effect said that it was the owner and in possession of the ore, but that said ore was taken from a vein the apex of which enters and departs through the same side line, and for a distance the apex of the section of the vein from which the ore was taken is only partly within the surface boundaries of such mining claim, by reason of which the defendant disputes the claim of ownership and possession of said ore. In other words, the allegations in the complaint, which were not necessary to a statement of the plaintiff's claim, amount simply to a statement of what the defense would be.

In the case of the *Colorado Consolidated Mining Co.* v. *Turck*, 150 U. S. 138, it was claimed that the question "whether the patentees of a lode mining claim, whose discovery and patent were later than the date of another's patent, may follow his junior patented lode, the apex thereof being within his side line, into the other's patented ground on the dip," was a federal question. The court held that this question was not presented by the complaint. If the plaintiff in the case had alleged that the section of the vein in dispute was beneath the surface boundaries of the mining claim of the defendant, and that such claim was located and patented before the location of the plaintiff's mining claim, would this court have had jurisdiction? It is apparent that such allegations were not essential to a statement of the plaintiff's claim, and if we admit that such allegations would have presented a federal question, it must follow that the jurisdiction of the circuit court depends upon the manner of the statement of the claim or the allegations made, and not upon the nature of the claim itself or the allegations necessary to state such claim. In the case at bar there was no more necessity for the allegation with reference to the Nine Hour claim, or the description of the apex of the lode or vein from which the ore was taken, with reference to the eastern boundary of the St. Louis claim than there was in the Turck case for an allegation as to the ownership and date of location and patent of the mining claim beneath the surface of which the section of the lode in dispute was located.

If Federal questions were presented by the statement of the claim of plaintiff, the answer filed eliminated such Federal question from the case. In the answer all allegations of the complaint with reference to the description, ownership and possession of this lode or vein from which the ore was taken are denied, and the defense is based upon the conveyance of what is known as the "compromise ground."

In the opinion in the case of *Robinson* v. *Anderson*, 121 U. S. 522, the Court said:

> "Even if the complaint, standing by itself, made out a cause of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied on."

In the case of *Boston & Montana Consolidated Copper & Silver Mining Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 630, this Court said:

> "Jurisdiction in this class of cases must be based upon the fact that the cause is one arising under the constitution or laws of the United States. If it appear to be such in the plaintiff's pleading simply because of the allegations as to what the defenses are on the part of the defendant, if when the answer comes in it is seen that no such defense in fact is set up or insisted upon, it is then seen that no such cause exists as stated in the complaint, and no jurisdiction therefore exists to try questions which are not of a kind coming within the statute, and the Court should then dismiss for want of jurisdiction."

Whether or not the questions arising from the situation of the apex of the vein from which the ore was taken with reference to the eastern boundary line of the St. Louis claim are Federal questions, is considered in the brief filed in support of

the motion to dismiss the application for mandamus made in the case, and was argued on the hearing of such motion.

Respectfully submitted,

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J. H. RALSTON,
Attorneys for Defendant in Error.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

Office Supreme Court, U. S.
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CLERK.

No. 402.

MONTANA MINING COMPANY, LIMITED, PLAINTIFF IN ERROR,

vs.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

This case has been called so frequently to the attention of this court that a very short statement of facts will suffice.

The defendant in error was plaintiff in an action at law, in the United States court for the district of Montana. The action was brought in 1893, for damages for ore extracted from a vein of the said plaintiff dipping beneath the surface ground of the said defendant. The first complaint, filed in 1893, is not in the original record nor a part of the record, nor can it properly be made a part of the record, for the reason that this is a writ of error to the circuit court of appeals and not to the circuit court for the district of Montana. The original complaint was not a part of the record in the circuit court of appeals, and this court will take the record of that court as it stood there, not remake, or re-form, or re-prepare any part of the record of the circuit court of appeals.

The amended complaint, upon which the trial was had, was filed June 26, 1899. The defendant in that case, plaintiff in error, did not make any objection to the filing of that amended complaint, but took issue with it. Damages were claimed in that complaint down to the date of its filing.

It is immaterial whether this action is called one of trespass and a claim for recovery for ores taken, or whether it is called trover or conversion for the ore, the nature of the action is the same. No claim for damages is made for the mere entry upon the land or its disfigurement or injury. The whole claim for damages is for the conversion of the ore. In this view, there is no distinction in the measure of damages or nature of the action. In the State of Montana the title to land cannot be tried by trespass. The title can only be determined by ejectment or bill to quiet title. So that nothing can be involved in this case except the mere value of the ore, the amount of the verdict in this case.

The trial which we now review was had in June and July, 1905. The defendant in error contends that there are no Federal questions involved and this court is without jurisdiction on this writ. This branch has been so fully discussed that it will not be reviewed again. We wish to add to that brief, however, the following cases:

Boston M. Co. *vs.* Boston O. Purchasing Co., 188 U. S., 632-638.
S. C., 85 Fed., 867.
S. C., 93 Fed., 274.
Robinson *vs.* Anderson, 121 U. S., 522.

The plaintiff's complaint alleges the apex of an ancillary, or what the statute calls "other," vein extending from the 520-foot plane drawn parallel to the north end line of the St. Louis mining claim to another plane, called for convenience the 108-foot plane, and then adds as an extra description by itself 25 feet more of the said vein between the 108-foot plane and the 133-foot plane. The figure (Rec-

ord, page 4) fully explains these. The vein has its apex wholly within the St. Louis, between the first two named planes. It has its apex partly within the St. Louis, between the 108 and 133-foot planes. The St. Louis is the older claim; was located first and patented first.

ARGUMENT.

I.

The plaintiff in error has stated in a brief in original No. 13 the Federal questions which its counsel deem are involved in this writ. They will probably be repeated here. We answer to them all, upon the merits, by citing the single case of Walrath *vs.* Champion Mining Co., 171 U. S., 293. The language of that case has been quoted so often that it seems almost improper to requote it; but it should be before us at all times, so I quote from pages 307 and 308:

"This court in Del Monte Mining Co. *vs.* Last Chance Mining Co., decided at the present term, *ante*, 55, reviewed the cases we have cited, and speaking for the court, Mr. Justice Brewer said:

" 'Our conclusion may be summend up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed, that, in fact, the location has been placed not along, but across the course of the vein. In such case, the law

declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this, upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular.' Mining Company *vs.* Tarbet, 98 U. S., 463-468.

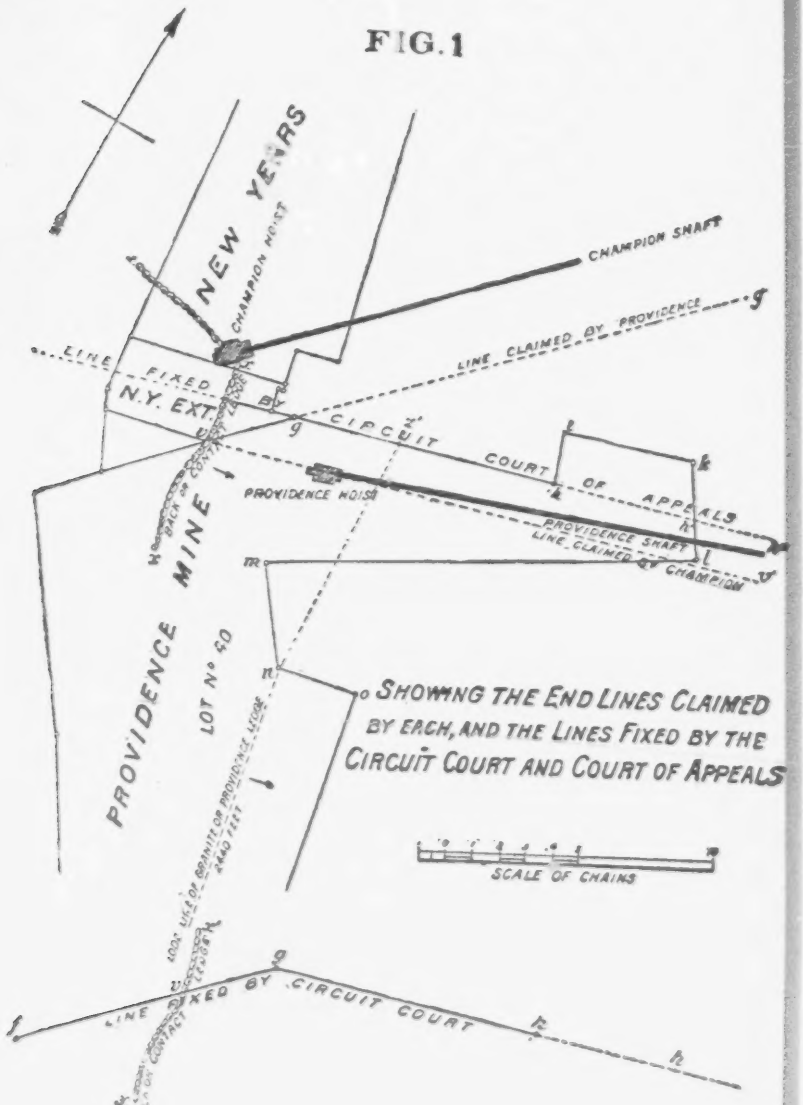
"These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

The meaning of that case, as applied to this, is that we are entitled to follow outside our side lines all veins having the same dip, same direction, which apex within our premises to the extreme limit of the discovery vein of the St. Louis. Judge Hunt put that condition to the plaintiff's right to recover in his charge, and the jury have found with us, that the discovery vein extends from the 520-foot plane to the 133-foot plane. (See Judge Hunt's charge, Record, page 92; original, 186.) Taking it, then, as an established fact that the St. Louis discovery vein runs lengthwise of the claim and extends from one plane to the other, 520 to 133, we had a right to follow the Drum Lummon or incidental vein through that distance, even if a part of the apex was not within our claims. (Refer to the figure of the Walrath case at page 295, here re-produced.) This court in that case gave to the Providence mining claim a line covering the incidental vein, though a part of it (v–h) extended beyond and outside of the premises of the Providence.

II.

The right of the plaintiff, St. Louis Company, to follow its vein, although it enters at the side line and departs through the same side line, has been established by this court in other

FIG. 1


NEW YEARS
CHAMPION HOIST
CHAMPION SHAFT
LINE
FIXED
BY
N.Y. EXT.
LINE CLAIMED BY PROVIDENCE
CIRCUIT
COURT
OF
APPEALS
PROVIDENCE HOIST
PROVIDENCE SHAFT
LINE CLAIMED BY CHAMPION
PROVIDENCE MINE
LOT N° 40
SHOWING THE END LINES CLAIMED BY EACH, AND THE LINES FIXED BY THE CIRCUIT COURT AND COURT OF APPEALS
SCALE OF CHAINS
LINE FIXED BY CIRCUIT COURT

cases, the only condition being that the general direction of the claim be with and along the vein. That proposition has been settled, not only here, but in a variety of Federal decisions. It was first raised here in the case of Last Chance *vs.* Tyler, 157 U. S. There was an intimation in that case that where the claim and vein were substantially in the same direction the owner of the apex could recover ores on the dip under another claim. The case was determined on other questions and it was not finally disposed of. The Del Monte case, 171 U. S., 84 *et seq.*, finally disposed of the whole question in favor of our present contention.

2 Lindley on Mines, sec. 584 (2d ed.).

III.

Between planes 108 and 133 the vein passes, or is alleged to pass, from the St. Louis into the Nine Hour claim of the defendant. Passing at an angle, of course the apex would be partly within and partly without the St. Louis. The St. Louis claims no right to follow the surface or any of the surface of the Nine Hour, but, going to the deep on that vein for that 25 feet, the St. Louis says that the ore belongs to it because it, being the older claim, takes the whole of the vein. The vein is indivisible, a unit, an entity. Its width is not uniform, is never uniform in any vein. The ores cannot be divided by any longitudinal demarcation or division. We claim the general rule as laid down by Judge Field in the Argentine case, 122 U. S., 484:

"If there was an apex or outcropping of the same vein within the surface of the boundaries of the claims of the defendant, that company could not extend its workings under the Adelaide location, that being of earlier date. Assuming that on the same vein there were surface croppings within the boundaries of both claims, the one first located necessarily carried the right to work the vein."

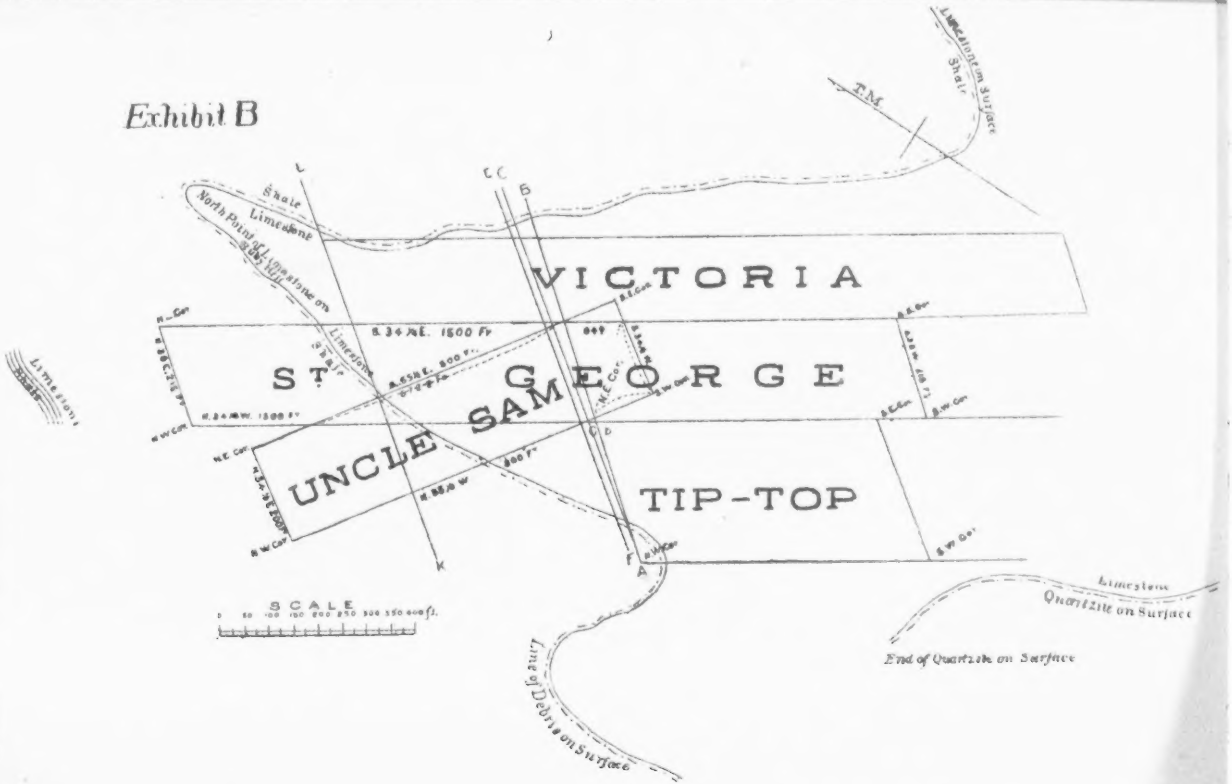
The first time the question was raised in this court was in the Rose-Richmond litigation, 17 Nevada, 26; 114 U. S., 586. In that case the first location was the Uncle Sam. Subsequently the St. George was located. The St. George applied for patent. The Uncle Sam filed an adverse claim. The suit was allowed to slumber without being pushed by either side. Pending that procedure, the Victoria was located, patent applied for, and patented. The victoria was on the same vein as the Uncle Sam and St. George, which had litigation, but did not have a surface conflict with it. The Supreme Court of Nevada held that the patent to the Victoria was void. The Supreme Court of the United States affirm that decision and say:

"But without deciding the question of their right to pursue the vein under ground as against a prior valid location, by reason of the earlier date of patent, we concur with the Supreme Court that the right to that part of this very vein being in contest between these parties in reference to the Uncle Sam and St. George claims, the decision of this controversy cannot be rendered nugatory by the introduction of a new claim by one of the parties, whose claim of right from the government for this same location is initiated while this litigation is going on. The parties were all in court. The subject-matter was before the court. The thing to be decided was the right of the conflicting claims to this lode. This was within the jurisdiction of the court, and any patent issued to one, or the other, or both these parties, under this proceeding for this property, must relate back to the date of their claims, and override the new patent. This result cannot be defeated by producing this new patent to destroy it. The claim was initiated by a party to this suit *pendente lite,* and must abide the result of the litigation in this case."

To properly appreciate this case we should have before us the diagram at page 45 of 17th Nevada.

Following the decision of this court in the Rose case, the Supreme Court of Utah gave a very full and careful examination of this question in the Bullion Beck Mining Co.

Exhibit B


T.M.
Limestone on Surface
Shale
L
CC
B
Shale
North Point of Limestone
Limestone
VICTORIA
N. Cor.
S. 34 NE. 1500 Ft
S.E. Cor.
S.W. Cor.
ST. GEORGE
Limestone
S. 63 NE. 800 Ft.
N.E. Cor.
S.W. Cor.
S. 24 W. 1500 Ft
N.W. Cor.
N.E. Cor.
UNCLE SAM
D
N. 24 W. 1500 Ft
N. 66 W. 800 Ft
S.W. Cor.
TIP-TOP
S.W. Cor.
K
A
SCALE
0 50 100 150 200 250 300 350 400 ft.
Limestone Quartzite on Surface
End of Quartzite on Surface
Limit of Debris on Surface
Little Point
Shale

vs. Eureka Mining Co., 5 Utah, 49 to 55. Many decisions of the Federal courts have determined the rule in our favor.

St. Louis *vs.* Montana, 104 Fed., 667.

Bunker Hill M. Co. *vs.* Empire State M. Co., 106 Fed., 472.

Empire State M. Co. *vs.* Bunker Hill M. Co., 114 Fed., 419.

Last Chance M. Co. *vs.* Bunker Hill M. Co., 131 Fed., 572.

Empire State M. Co. *vs.* Bunker Hill Co., 131 Fed., 591.

And finally and very ably in the case of U. S. M. Co. *vs.* Lawson, 134 Fed., 774.

2 Lindley on Mines, secs. 583 and 594 (2d. ed.).

In the case of Bunker Hill *vs.* Empire State, etc., 106 Fed., 472, Judge Beattie, of the Idaho district, very clearly discusses this question:

"The Viola and San Carlos are parallel to each other, are located along the course of the ledge, and each has within its surface a portion of the apex. The Viola, being the older, would, by the weight of authority, take the whole ledge. If this court had any doubts on that proposition, it still would be controlled by the late decision in St. Louis Min. & Mill. Co. *v.* Montana Min. Co., 104 Fed., 664, by the circuit court of appeals of this circuit. The wisdom of the decision is illustrated in this case; for if a ledge can thus be divided longitudinally between two parallel claims, a locator could do what defendant claims in this case,—so locate two parallel claims upon the same apex as to have them follow the ledge upon oblique dips in different directions, thus taking the ledge on the underground for a much greater length than owned of the apex, which is in direct conflict with that vital principle of the mining law, the parallelism of those lines or planes which cross the ledge. * * * There can be but one reasonable solution of this perplexing problem, and that is that the senior location, having within its surface a part of the width of the apex, shall own the entire width.

The Viola, being senior to the San Carlos as well as to the Likely and Skookum, owns, as to all those claims, the entire ledge."

IV.

In all briefs and arguments of counsel for plaintiff in error much stress is laid upon the effect of a deed from the owners of the St. Louis to the owners of the Nine Hour of what is known as the "compromise strip." It does not seem possible that any Federal question can be connected with it, although counsel for plaintiff in error insist there is; but what or how is not apparent. The plaintiff in error has also asked for a writ of certiorari to the circuit court of appeals, evidently not daring to rest upon its so-called Federal questions on writ of error. Such writ of certiorari (it is claimed) would raise this question of that deed, reviving the ground again of that litigation and the circumstances and effect of it.

The owners of the St. Louis mining claim applied for patent for it, as the older of the locations. This application was way back in the early eighties. Two of the then owners of the Nine Hour, who were Robinson, Huggins, Sterling *et al.*, filed an adverse claim in the land office and brought suit upon it in the usual manner, alleging the area in conflict and asking judgment for the ground in conflict. After the suit was filed the parties got together and settled the suit by a contract (Exhibit "A," Record, pages 9 and 45). Charles Mayger, the owner of the St. Louis, proceeded and got his patent; but before Mayger got his patent, Robinson, Huggins, and Sterling had deeded the Nine Hour claim as an entity and a "claim" to the Montana Mining Company, Limited. When the patent was obtained the Montana Mining Company demanded the deed. Mayger for a number of defenses refused to execute the deed, and among them was the claim that he had himself procured an assignment from the contractors on the other side, he apparently believing that it was

simply a case of contract. The Montana Mining Company, Limited, filed a suit in the State court. The complaint is found at Record pages 41-44. As the Montana Mining Company was not the assignee of that contract, it was apparent that it could not recover its specific performance unless the contract was so connected with the Nine Hour claim as to pass with it by deed; and so they alleged (Record, page 42; original, 44):

"That thereupon, on the 7th day of March, A. D. 1884, to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said St. Louis mining claim said Charles Mayger executed and delivered to said Robinson, Huggins and Sterling Exhibit 'A.'"

Again, at the fourth paragraph of their complaint, page 43; original, 86:

"And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described, has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour Lode mining claim."

Again, at page 44; original, 87:

"The said defendant, The St. Louis Mining and Milling Company of Montana, had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its said codefendant and of the rights and equities of plaintiff thereunder as being the *successor in interest* of the said Robinson, Huggins, Sterling and its other grantors."

The court found with the plaintiffs in that action and made findings (Record, pages 50-51). These findings were necessary under the law of Montana and constitute a part of the decree.

Finding 2 is "that the strip of ground called the 'compromise ground,' which is the subject of dispute in this action, was at that time and thereafter continued to be a part of the Nine Hour Lode mining claim" (Record, page 50; original, 99).

Finding 5, page 51; original, 101:

"That at the date of the execution of the said bond, the said Robinson, Huggins and Sterling, Eddy and De Camp were in the actual possession of the said compromise strip and that they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of the said Nine Hour Lode mining claim."

Again, finding No. 8, page 52; original, 101, the court found:

"It was the intention of the parties to the deeds to convey as well their interests in said compromise strip as every other part and parcel of the said Nine Hour Lode mining claim."

Thus it will be seen that there never was any contract or intention to contract to SELL any property, but SIMPLY TO FIX THE BOUNDARY LINE BETWEEN THE ST. LOUIS AND THE NINE HOUR. The St. Louis was to be and continue to be a mining claim, with all the rights of a mining claim, retaining the right to go underneath other claims. The Nine Hour was to continue to be a single mining claim, and the compromise strip was simply fixed to establish the boundary of it. On this trial counsel for plaintiff in error attempted to reinstate that adverse suit of the early eighties and put in such evidence as possibly might have been proper at that time. This was offered for the purpose of overthrowing the opinion of the circuit court of appeals in this cause (102 Fed., 432). The present plaintiff in error had brought that suit, had drawn that complaint and the findings to suit itself, and now is seeking to set it aside for the purpose of extending, enlarging, and changing its effect and meaning. No

authority has ever been cited for such a procedure and I apprehend none can be. It needs but the statement of the case to explain the whole judgment-roll and the judgment-roll explains it. The deed was given in pursuance of a decree upon that contract and is not to be considered as a contractual deed, because the parties did not have any intention at all with regard to executing a deed. It was prepared by the court as a part of its decree and entered as an execution. Defendant in that case was forced to sign to obtain an appeal and to prevent contempt proceedings. The only *intention* of the parties is to be determined by the original Exhibit "A" (Record, pages 9 and 45).

That intention was determined in the judgment and record of the so-called Specific Performance case, and the contract and intention merged therein. They are not open for consideration in this case.

The pleadings, findings of fact, and conclusions of law in the case constitute a complete answer to the claim now made, that it was the intention of the parties to the contract that the conveyance should embrace the ore in controversy in this action. A full and fair statement of the facts in the case was made by Mr. Chief Justice Fuller when the case was before the Supreme Court of the United States, to which reference is hereby made (171 U. S., 650). It appears from the complaint in the case that the compromise ground was the *entire area* in conflict between the Nine Hour and the St. Louis claims; that Mayger applied for a patent to the St. Louis claim, and in the survey he caused to be made of his claim he included a part of the Nine Hour Lode mining claim; that thereupon an action was commenced to determine the right to the possession of the compromise ground; that afterwards, "to settle and compromise the said suit and adverse claim and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour Lode mining claim and the said St. Louis Lode mining claim," the

bond for a deed or contract in question was executed and delivered.

The right of the plaintiff was not based upon any contractual relation with Mayger or the St. Louis Company. There is no allegation of any assignment of the interests in the contract by either of the contracting parties. The plaintiff based its right to a conveyance upon the fact of its ownership of the Nine Hour claim.

It was because of this position taken by the plaintiff in the so-called Specific Performance case and the theory upon which it had succeeded in obtaining a judgment that the case was taken to the Supreme Court of the United States by the St. Louis Company. In the opinion of the Supreme Court of the United States (171 U. S., 650) it is said:

"The proposition of plaintiffs in error is that where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is the duty of the latter to file an adverse claim and thereafter bring in some court of competent jurisdiction an action to determine the right to the area in conflict, which action must be prosecuted to a final judgment or dismissed; and that no valid settlement can be made by which such adverse claimant can acquire any interest in the ground when thereafter patented by the applicant. We are not aware of any public policy of the Government which sustains this proposition."

In the opinion of the Supreme Court of the State in the case (20 Mont., 405) it is said:

"What did the parties do? In order to settle a costly and troublesome lawsuit they entered into a compromise, by which they settled the title among themselves to the ground in dispute and fixed the boundary line between their two claims."

The case was litigated to a conclusion in the Supreme Court of the United States upon the theory advanced by the plaintiff in the case, that the compromise ground was

always a part of the Nine Hour claim, and the purpose of the arrangement resulting in the bond for a deed was to settle and establish the boundary line between the St. Louis and Nine Hour claims. This theory is wholly inconsistent with the idea that the owners of the Nine Hour claim were to receive more by the conveyance than they would have obtained if a patent had been issued to them for the compromise ground as a part of the Nine Hour claim. The plaintiff in the case took the position that by the conveyance of the Nine Hour claim it had acquired the equitable title and right to the possession of the compromise ground and was entitled to a conveyance of the legal title, which had been acquired by Mayger, as trustee for the owners of the Nine Hour claim. Whether or not the compromise ground had been located as a part of the Nine Hour claim or as a part of the St. Louis claim was distinctly an issue in the case, and the court found that it was always a part of the Nine Hour claim, and that by reason of this fact and the arrangement made whereby title was to be taken by Mayger, with the understanding that the same would be conveyed, the plaintiff was entitled to the conveyance. The action was in fact an action to declare and enforce a trust, although termed an action for specific performance. The case stands the same as where A purchases real estate and for some reason directs that the title should be transferred to B, to be held in trust for A. In view of these considerations, it is apparent that the Montana Company only acquired, by the judgment and the conveyance made in pursuance thereto, the legal title to the compromise ground to which it and its grantors always held the equitable title. The judgment conclusively estops the Montana Company from claiming more than its grantors would have received if the patent to the Nine Hour claim had included the compromise ground.

During the second trial of this case in the court below evidence was offered for the stated purpose of showing the intention of the parties to the contract to convey, in order

that the contract might be construed in accordance with such intention. Error was assigned upon the refusal of the court to receive such evidence. There are several conclusive reasons in support of the action of the circuit court with reference to this matter. The purpose of the evidence was to establish that it was the intention of the parties that the ore in controversy in this case, although in a vein which has its apex within the St. Louis claim, was intended to be conveyed, thereby disproving the allegations in the complaint in the so-called Specific Performance case upon which judgment had been recovered. This was not permissible.

In the case of Davis *vs.* Wakelee, 156 U. S., 680, the court said:

"It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

The Montana Company having recovered a judgment in the case, it is now estopped from disputing what it then asserted in order to secure such judgment. Let us assume that the position which it took in the case was because the St. Louis Company had acquired the interests of three of the parties to the contract. If, then, it had claimed under the contract, it could have only acquired an undivided interest in the compromise ground. Now that its interests have change, it should not be allowed to treat the conveyance as a conveyance of a part of the St. Louis claim.

In construing that instrument, including all the other subsequent papers, we must remember:

"That the language used is to be construed with reference to the peculiar property about which the parties were contracting."

Richmond Mining Co. *vs.* Eureka Mining Co., 103 U. S., 846.

"The peculiar property" that we were contracting about, then, is the subject to which we must direct our attention. It was not only a mining property, but it was also a mining property which was "a part of the Nine Hour mining claim." It is contended by the plaintiff in error that the words contained in that deed are capable of two meanings—meaning which gives a vertical line on the westerly side of the compromise ground and another meaning which gives a line parallel to the vein on the other side of the compromise ground. The expression in the deed so often referred to is part of the general printed clause in such a deed:

"Together with all the dips, spurs, and angles and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed."

and is capable of more than one meaning. Was it intended to convey by vertical lines, as in the case of agricultural lands? or was it intended to convey only such ores as the Nine Hour claim would have been entitled to had there not been a wrong survey across a part of its area? or was it intended to convey that which wholly or in part apexed within said claim? Three or four different meanings may be given to this language, all entirely consistent with its terms.

The phrase "the metals, ores, gold and silver bearing quartz rock and earth therein and all the rights privileges and franchises thereto incident, appended or appurtenant or therewith usually had and enjoyed" limits and not extends the grant. No vein or ores were *"appurtenant"* to that property or usually had or enjoyed therewith, except such as had its apex entirely within the compromise strip.

In Merriam *vs.* United States, 107 U. S., 437, the syllabus is:

"In construing contracts, a court may look not only to their terms, but to their subject-matter and the surrounding

circumstances, and avail itself of the same light which at the time of making them the parties possessed."

In Doe *vs.* Burt, 1 T. R., 701, the court said:

"The only question is whether the court is absolutely bound by the terms of this lease to put the construction on it for which the defendant contends. Now, it seems to me, that the construction of all deeds must be made with a reference to their subject-matter. * * * In the present case, considering the nature of the property, it was proper to let in evidence to show the state and condition of it at the time when the lease was granted. *Prima facie*, indeed, the property in the cellar would pass by the demise, but that might be regulated and explained by circumstances. Therefore I am of opinion, that, considering all the circumstances of this case, it was proper to receive the evidence at the trial, which, when received, proved that the cellar was not intended to be passed by the demise to the defendant."

In the case of Brawley *vs.* United States, 96 U. S., 173, the court says:

"Previous and contemporary transactions and facts may be properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

When this deed, contract, and record are viewed in the light of the circumstances in which the parties were placed, to wit, the original controversy between the Nine Hour and the St. Louis, the purpose for which the suit for specific performance was brought, the fact that the owners of the Nine Hour were permitted to recover without any deed of conveyance or assignment from the persons to whom the contract for the compromise ground was given, the findings of the court in the Specific Performance case, and the decision of the court thereon—all these together show conclusively that the deed of the little strip known as the "com-

promise ground" conveyed nothing more than just a part of the Nine Hour claim; that the St. Louis did not deed, and therefore reserved, all the rights it would have had had the claim been surveyed originally to and including its present boundaries. That was the intent of the parties. The Nine Hour never paid for or claimed any part of the vein or any vein belonging to the St. Louis mining claim. *All that had its apex within the St. Louis belonged to it and had belonged to it and had never been contracted to be conveyed,* and by no sleight of hand or skill in wording of conveyance could it be considered to be transferred to the Nine Hour claim.

St. Louis M. & M. Co. *vs.* Montana M. Co., 171 U. S., 653.

What would be the rights of these parties had the owners of the St. Louis owned the whole of the Nine Hour and had conveyed the whole of the Nine Hour? Would it convey any of the St. Louis in doing it? A conveyance of the Nine Hour would only carry the conveyance of the Government, and the owners of the Nine Hour would own only the surface and the veins which have their apex therein. A deed from private parties for the Nine Hour would reserve, as the patent from the United States would reserve, the right of all persons, including the grantor, to enter underneath the premises upon a vein having its apex within their own land and extract ore therefrom.

The patent for lands of the United States Government is construed with reference to the properties conveyed and in obedience to law; and whatever language used conveys simply what the language of the law conveys, section 2322, viz., the surface ground and all veins having their apex therein, and that is all that is given by the law of Congress, and not more.

Deffeback *vs.* Hawke, 115 U. S., 392-406.
Davis's Adm'r *vs.* Weibold, 139 U. S., 506.

The case of Richmond Mining Company *vs.* Eureka Mining Co., 103 U. S., 839, entirely supports our contention. The Potts Chamber involved in that litigation was upon the dip of the vein far outside of all the premises, if considered at the time of the original compromise. A deed dividing the premises along the course of the vein was held to carry not only the surface, but also the dip of the vein. It was vertical in its application lengthwise of the vein, but on the dip of the vein it was held to carry the whole vein. The circumstances were entirely different from this. To make it applicable here, there should have been a controversy as to the length of the apex by these parties, and a division along the strike of the apex would have been held to carry the dip also, and, as quoted above, the language used with regard to a mining deed is to be construed with regard to the peculiar property about which the parties are contracting.

Neither does the case of Stinchfield *vs.* Gillis, in the 96th and 107th California, sustain the contention of the plaintiff in error, and, moreover, the deed in that case was not made under the circumstances which surround the execution of the deed in the case under review. In that case Gillis had been in possession of a large tract of mineral land. He conveyed a part of it by bargain and sale deed, with implied warranty. One vein apexed in the part sold and another vein apexed in the part retained by Gillis. These two veins united on their dip within the surface boundary lines of the part conveyed. It will appear from the facts stated in the 107th California that the defendant claimed that the land had been located under two locations, and that the part retained was the prior location.

We quote:

"At the former appeal herein it was held that if the locator of a mining claim should convey a portion of his claim without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within

the ground conveyed in any vein whose apex was within the surface lines of his deed; so, if a locator should convey to A the east half of his claim, and afterwards should convey the west half to B, each of the grantees would in the same manner be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance; and, on the same principle, if the proprietor of a tract of mining ground which has been derived through several locations should dispose of the same in parcels, irrespective of the lines of such locations, the rights of his grantees would be measured by the terms of their deeds. In such cases section 2336 of the Revised Statutes of the United States has no application. That statute was not intended to limit or define the rights of a person in mere possession of a tract of mining ground where there is more than one vein, or to prescribe the effect of a conveyance by the locator of a claim of a portion of his location containing one of such veins. The object of the statute was to supplement the provisions of section 2332, and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins. At the date of the passage of that act, May 10, 1872, the Carrington claim was and had for many years been held as a single claim, without any adverse claim thereto, and it continued so to be held until the conveyance by Gillis to the plaintiff in 1886. The position of the proprietor of a mining claim who conveys a portion thereof, and retains the remainder, is analogous to the position of the United States after it has issued its patent for a location. As the United States, as well as a subsequent locator, hold the unpatented claim subject to the prior rights of the patentee, as prescribed by section 2336, so the grantor of a portion of his claim, in the absence of any reservation in his deed, or proof of mining customs, holds the ungranted portion subordinate to the rights of his grantee in the ground conveyed. * * *

"In thus holding, we conceded that, when mining ground is conveyed by deed without express limitation, the grantee takes subject to the characteristics of mining property given to it by prevailing customs and law, and not with the absolute dominion which flows from a conveyance in fee of ordinary land. The mining land thus granted is still subject to all mining laws and customs which are applicable, but the provision of section 2336 that, when two veins intersect,

'priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection,' cannot possibly be applied to the case where A conveys part of his mining claim to B, for in such a case there is no 'prior location.' Therefore, in such a case, the ordinary rules which govern grants of land must of necessity apply; and, if the intersection takes place on part of the claim conveyed, the grantee takes all the mineral within the space of intersection.

"Whether the plaintiff would have been entitled to follow the west vein into the ground retained by Gillis, and to claim the gold found therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein, within the ground conveyed to the plaintiff, are questions which are not involved in this appeal, and upon which we do not express any opinion. All that we hold is that, inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff." * * *

"So, if a locator should convey to 'A' the east half of his claim, and afterwards should convey the west half to 'B,' each of his grantees would, in the same manner, be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance."

We will add a portion of the opinion of the circuit court of appeals in the former hearing of the case, 102 Fed., 432:

"The controversy between the owners of the St. Louis and the Nine Hour claims was one which involved the surface lines only. No dispute had arisen concerning the ores beneath the surface. The owners of the Nine Hour claimed nothing more than that the eastern side line of the St. Louis, as it was surveyed, encroached upon their territory. They based their adverse action upon that contention. The compromise was an admission that their claim was just. When the suit was brought for the specific performance of the compromise contract, it was brought by the successors in interest of those who had represented the Nine Hour claim at the time of the compromise. The plaintiffs therein were not the assignees of the contract. They maintained the suit solely as owners of the Nine Hour claim, and upon the theory that

the strip of land so contracted to be conveyed was a portion of the Nine Hour claim. All these antecedent circumstances leading up to and culminating in the deed are properly considered in determining what was the intent of the parties to the contract. If the adverse action which was brought by the owners of the Nine Hour claim had gone to trial, and had resulted in a judgment fully sustaining their contention, the result would have been to fix a surface line of division between the two claims, without affecting rights to the ore beneath the surface otherwise than as they are controlled by the mining laws of the United States. The owners of the St. Louis claim would still have retained the right to follow their vein extralaterally in its dip beneath the surface of the strip of land which was the subject of the conveyance. Upon what theory can it be said that the owners of the Nine Hour claim acquired more by the conveyance which was made to compromise the action than they could have acquired by a judgment in the action itself, fixing the boundary upon the very line which they contended was the true line? It is not to be supposed that the owners of the St. Louis claim intended, by the compromise contract, not only to surrender the whole of their contention concerning the true location of the boundary line, but also to divest their claim of its extralateral rights,—rights that had not been in litigation, and had not been assailed by the owners of the adjoining claim. To manifest such an intention, the terms of the contract and of the conveyance would, under the circumstances, need to be clear and explicit. The use of the words 'together with all the minerals therein contained' is not sufficient. Those words so inserted in the contract and in the deed are not more inclusive or more significant than the words universally employed in grants of mining claims, 'together with dips, spurs, angles and also all the metals, ores, etc., therein.' "

V.

If the certiorari were to be granted and the case come here as it stood before the circuit court of appeals, we have discussed now all the questions except a few trifling ones as to admissibility of evidence, and which it will not be necessary to review, and some exceptions to the charge as to the use of

the word "satisfaction." We clip a small portion of one of the briefs used in the circuit court of appeals:

The fifth instruction (Record, page 91) reads as follows:

"The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages. But if the plaintiff makes a *prima facie* case by its evidence, and the presumptions of law applicable to the situation, that it has extralateral rights to its discovery vein, between the 520 and 133 foot planes, and therefore to that part of the Drumlummon vein in dispute, then the defendant must overcome this *prima facie* case and these presumptions by showing to the satisfaction of the jury that plaintiff has no extralateral rights."

It is said that by the use of the word "satisfaction" in this instruction the court required the plaintiff in error to furnish a higher degree of proof than the law demands.

When this instruction is construed in connection with the other parts of the charge, it will be seen that there is no ground for the criticism made. In the first part of instruction 5 the court said:

"The plaintiff must show a right of recovery. This applies as well to the question of extralateral rights on the Drumlummon vein in dispute, and upon its discovery vein, as the question of damages."

In the 14th instruction (Record, page 94) the court told the jury that the "burden of proof is upon the plaintiff to show by a preponderance of evidence its ownership, the amount of ore extracted, and its value."

Instruction 25 (Record, page 97) reads as follows:

"When you are told in this charge that the burden of proof upon any issue is upon either party to this action, you are to understand that such party must present evidence for your consideration which preponderates over the evidence of the other party upon that issue; and if, after due consideration of all the evidence introduced by the party having the

burden of proof, it does not preponderate in his favor, but that the evidence of each party is equal, in your judgment, it is your duty to find such issue against the party having the burden of proof, under these instructions. In determining the weight of the evidence you are not to consider alone the number of witnesses which have been sworn in behalf of either party, but to take into consideration the circumstances under which the evidence was given, the character and standing of the witnesses, their appearance upon the witness stand, and all the circumstances of their evidence, and after such consideration, you are to determine the weight and preponderance of the evidence upon each issue in favor of one or the other of the parties to this suit."

The language of the Supreme Court of the United States in the opinion in the case of Etna Life Ins. Co. *vs.* Ward, 140 U. S., 76, is applicable to the objection made to instruction 5. The court said:

"The most important specification of error in the entire list is as follows: 'The court erred in charging the jury that the "weight of the testimony must decidedly preponderate on the side of the defendant." ' Objection is particularly made to the use of the word 'decidedly' in this connection. The argument is, that the effect of that part of the charge was to direct the jury to return a verdict for the plaintiff, unless the evidence introduced by the defendant to establish its defense should satisfy them, beyond a reasonable doubt, that the defense had been made out. The phrase 'decidedly preponderate' is not technically exact, with respect to the weight and quantity of evidence necessary and proper to justify a verdict in civil case. If, therefore, this clause of the charge stood isolated from any other part of it bearing upon the same subject-matter, there would be serious objection to it. But we think the immediate context, as above quoted, shows that no such meaning can be fairly derived from it as claimed by the defendant. On the contrary, such meaning is excluded in the same sentence, where the jury were told that 'such evidence need not be so convincing as to make the effect beyond reasonable doubt;' and then immediately follows the clause objected to. We think the clause, when taken in connection with the whole tenor and effect of the entire

charge, and especially in view of the immediate context, could not have misled the jury in the premises."

The plaintiff in error in its request to instruction No. XXII (Record, page 109) uses the expression "unless the plaintiff has *satisfied* you by a preponderance of the evidence." Again, in request No. XXVI (Record, page 110), we find this language: "This is so because the plaintiff must satisfy you by a preponderance of the evidence." It is quite evident that the objection now made to instruction 5 is an after-thought, and it is fair to presume that the use of the words "satisfy," "satisfied," and "satisfaction" in the charge was suggested by the plaintiff in error in the requests for instructions which it made. The words "satisfy," "satisfied," and "satisfaction" are used eleven times through the charge. In five instances one or the other of these words is used in referring to the proof required of the defendant in error. (See instructions 4, 11, 14, 17, and 31.) In instruction 31 the words "find," "satisfied," and "believe" are all used in the same sense.

In the case of Walker *vs.* Collins, decided by the Circuit Court of Appeals for the Eighth Circuit, 59 Fed., 70, 73, Circuit Judge Colville, in the opinion, said:

"The defendants excepted generally to this charge, and in this court limit the exception to the last clause of the charge, which states that 'it devolves upon him who alleges fraud to show the same by satisfactory proof, *i. e.*, proof to the satisfaction of the jury.' The objection to the charge is that the court should have told the jury that fraud may be established by a preponderance of the evidence, and not that it must be established by 'satisfactory proof, *i. e.*, proof to the satisfaction of the jury.' The charge is taken almost literally from the opinion of the Supreme Court of the United States in the case of Jones *v.* Simpson, 116 U. S., 609, 615. In that case the court said: 'It devolves on him who alleges fraud to show the same by satisfactory proof.' * * *

"In Bouvier's Law Dictionary (14th ed.) the term 'satisfactory evidence' is defined to be 'that evidence which is

sufficient to produce a belief that the thing is true; in other words it is credible evidence.' The Century Dictionary defines 'satisfactory evidence or sufficient evidence' to be 'such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced.' No better definition of these terms can be given, and it was in this sense, presumably, that the jury understood them."

See also—

Treusch *vs.* Ottenburg, 54 Fed. Rep., 867, 877.
Callan *vs.* Hanson, 53 N. W. Rep. (Ia.), 282.
Peletier *vs.* Railroad Co., 88 Wis., 521, 528.
Winston *vs.* Burnell, 44 Kan., 367.
Carstens *vs.* Earls, 26 Wash., 676, 690.
Kenyon *vs.* City, 73 N. W. Rep. (Wis.), 314.
Sams, etc., Co. *vs.* League, 54 Pac. Rep. (Colo.), 642.
Suber *vs.* Mayfield, 60 N. E. Rep. (Ind.), 7.

In the case of Rogers *vs.* Marshall, 1 Wall., 644, it is said:

"A nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious and cannot mislead the jury."

See also—

Baltimore & P. R. R. Co. *vs.* Mackey, 157 U. S., 86.

VI.

In the brief served in this cause a lengthy argument is made as to the sufficiency or insufficiency of the complaint in this case. No demurrer was filed to the second amended complaint. Answer was put in to the merits, thus waiving any formal objection, and by the affirmative answer admitting the sufficiency of the complaint. It has been held sufficient by the local courts twice, and we submit that it cannot now be raised on appeal or error. We refer to the language of the circuit court of appeals on the subject, quoted in the appendix to the plaintiff's brief.

VII.

Assertion is made by counsel on page 56 that the defendant in error relied for jurisdiction upon the fact that it was raising Federal questions, and did not rely upon diverse citizenship until the time the case came to this court. This is an assertion of fact by counsel which has no foundation in the record. We have for seven long years contended that there is no Federal question, and relied upon diverse citizenship in each and every trial. Four years ago that question was argued here on a motion to dismiss in this case.

We may say the same of all of brief of plaintiff in error, under heading "Material Facts Established by the Testimony," pp. 15-19. Most of these assertions are mere offers of proof.

VIII.

Long argument is made in brief of plaintiff in error (pp. 98-102) to show that the discovery vein of the St. Louis ran east and west and not north and south, as we alleged. That and the evidence of the witnesses for plaintiff in error is quoted. They show a question of fact to be determined by the jury; the verdict is a conclusive answer to it. The verdict was obtained under the conditions named in the charge of Judge Hunt, making it obligatory upon us to show that the vein ran northwesterly and southerly. This court will hardly sit here as a jury to retry that fact. If that evidence was called to your honors' attention, there would be no question but what you would agree to the jury. This is not an appeal in equity, with the evidence presented: the record does not pretend to present the evidence, but only such evidence as illustrates the exceptions taken.

IX.

A long sophistical argument is made upon the question of priority of the different claims. It is conceded that the St. Louis claim was located two years before the Nine Hour. It is conceded that the St. Louis claim was patented before

the Nine Hour, but because of this arrangement for the compromise strip and because of the subsequent suit and deed for the compromise strip, the plaintiff in error claims to antedate that part of the Nine Hour claim, so that it will be of the same date of the St. Louis. They say we deeded it to them as a part of the St. Louis, and therefore it must have the same date. It is the same old argument discussing the effect of that record; but the deed was not of a part of the St. Louis as such. It was a deed to determine the line of the Nine Hour, and the deed only left the grantee in possession of the compromise strip as a part of the Nine Hour. It could not antedate the location of the Nine Hour. It was Nine Hour ground before, it was Nine Hour ground all the time, and dates with the Nine Hour.

X.

Complaint is made that the plaintiffs were permitted to recover for a trifle of ore which the plaintiff in error had been enjoined from selling, but which had not been returned to the defendant in error. Upon that we think the opinion of the circuit court of appeals in 102 Federal Rep. most clearly illustrates the law, and we leave it as our brief. It is found at page 9 of the appendix to plaintiff's brief. What is said as to the condition of the record on that writ of error applies equally here.

We respectfully submit that this case should be dismissed, but, if not dismissed, affirmed.

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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term 1906

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

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JURISDICTION.

To sustain the claim that this court has jurisdiction to review the case upon a writ of error, reference is made to the original complaint, which was not a part of the record before the circuit court of appeals. It is argued that the original complaint stated a cause of action for trespass.

If the action should be considered as an action for a trespass it was not essential to the statement of the

plaintiff's claim or cause of action to describe the vein with reference to the boundaries of the St. Louis claim, and without such description the alleged federal questions would not be disclosed by the complaint.

Sec. 2322 of the Revised Statutes provides:

> "The locators of all mining locations * * * shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical sideline of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

Mr. Lindley in his work on Mines, 2d Ed., Vol. 2, Sec. 615, says:

> "Whenever the extralateral right of an apex propritor is challenged he is called upon to establish,—
>
> "(1) The existence of an apex within his boundaries to the extent necessary to cover the disputed segment of the vein;
>
> "(2) The identity and continuity of the vein from its top or apex within his own boundaries to the point in dispute."

He further says in the same section:

> "It will be sufficient if the apex is shown to the

extent that is necessary to cover the underground portion of the vein in dispute within the end line bounding planes."

The presumption obtains that the owner of a mining claim, in which the apex of a vein is shown to exist, is the owner of the vein and all ore therein contained.

Lindley on Mines, 2d Ed., Vol. 2, Sec. 866.

It was sufficient, then, for the plaintiff, in stating its claim, to allege that the ore was extracted from a vein which has its apex within the surface boundaries of the St. Louis claim and from between the end line planes of such claim. The allegation contained in the original complaint that the vein passes out through a side line is surplusage, and cannot be considered in determining the question of jurisdiction.

The alleged federal questions relied upon by plaintiff in error are stated as follows:

"When a vein enters and departs from the same boundary line of a mining claim, is such vein entitled to extralateral rights?

"When the apex of a wide vein crosses the boundary line of the claim at an acute angle can the miner within whose surface boundaries the apex is found follow it extralaterally beyond the point where he has the whole of the apex within his surface boundaries?"

(See brief for plaintiff in error, pp. 58 and 59.)

Neither of these questions are disclosed by the original complaint.

In the original complaint it is alleged that the plaintiff is a corporation, duly organized and existing under the laws of the State of Montana, and that the defend-

ant, the Montana Mining Company, Limited, is a corporation, duly incorporated and organized under the laws of the kingdom of Great Britain. No allegation is made with reference to the citizenship of the other defendants. Before the case was tried, however, the action was dismissed as to all the defendants except the Montana Mining Company, Limited. This was clearly permissible.

Horn v. Lockhart, 17 Wall. 570.

We therefore submit that whether the jurisdiction of the circuit court is determined from the original, or the second amended and supplemental complaint, it depended entirely upon the allegation that the plaintiff is a citizen of the United States, and that the defendant, the Montana Mining Company, Limited, is an alien.

MERITS OF CASE.

The original complaint was filed Sept. 16, 1893. The complaint in what is referred to as the "specific performance case" was filed Sept. 5, 1894. The judgment of the supreme court in the specific performance case was affirmed by this court, Oct. 31, 1898. The amended and supplemental complaint was filed Nov. 21, 1898. The second amended and supplemental complaint was filed June 26, 1899.

In the original complaint the plaintiff asserted possession and ownership of the St. Louis claim as patented. The compromise strip contained a portion of the apex of the segment of the vein to which the plaintiff was asserting possession and ownership. The Montana Company could not rely upon its equitable title to the compromise strip as a defense to this action at law, and resorted to an independent suit to acquire the legal title.

Pending the determination of the specific performance case the action at law was permitted to rest. After the determination of the specific performance case the second amended and supplemental complaint was filed, in which it is alleged, in paragraph 2, that the plaintiff

> " • • • was, and now is, the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis quartz lode mining claim, and of the quartz, rock and ore and precious metals contained in any and all veins, lodes and ledges of mineral bearing rock through their entire depth, the apex or apexes of which lie within the surface lines of the said fractional portion of the said St. Louis lode mining claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side line of the surface of the said St. Louis quartz lode mining claim." (Record p. 2.)

Then follows a description of the St. Louis claim by courses and distances, as per the description in the patent. After such description the following appears:

> "Save and except that portion thereof known as the 30-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour lode mining claim." (Record, p. 3.)

Paragraph 3 reads as follows:

> "That the said defendant the Montana Mining Company, Limited, is and was the owner of what is known and designated as the Nine Hour quartz lode mining claim, situate and being east of the said St. Louis lode mining claim, and including the 30-foot strip or compromise ground aforesaid, and that the discovery, location and recordation of the said St.

Louis lode mining claim and the United States patent therefor was made prior to the discovery, location and recordation and patent to the said Nine Hour lode mining claim." (Record, p. 3.)

In the answer the allegations contained in paragraphs 2 and 3, are expressly admitted. (Record, p. 7.)

It thus appears that the defendant, by its answer, admitted: (1) That the plaintiff is the owner and in possession of the St. Louis claim as described in the second amended and supplemental complaint; (2) that the plaintiff is the owner and in the possession of the ore and precious metals contained in any and all veins, lodes and ledges of mineral bearing rock, through their entire depth, the apexes of which lie within the surface lines of the St. Louis claim, although such veins, lodes or ledges may so far depart from a perpendicular in their downward course as to extend outside of the vertical side lines of said claim; (3) that the compromise ground, as described in the second amended and supplemental complaint, was a part of the Nine Hour claim; and (4) that the St. Louis claim, as described, was located prior to the location of the Nine Hour claim.

In view of these admissions, the proof offered to show that a part of the St. Louis claim was located subsequent to the location of the Nine Hour, and that the compromise ground is not correctly described, was properly rejected.

What was said at the argument of the case by counsel for plaintiff in error, with reference to the boundaries of the St. Louis claim having been changed after the application for a patent and after the making of the compromise agreement, was not authorized by the record, and has no foundation in fact. The compromise agreement, the judgment in the specific perform-

ance case, and the deed, all describe the compromise ground as it is described in the second amended and supplemental complaint, and this description is admitted by defendant in its answer to be correct. The compromise ground consists of a strip of land thirty feet wide and is said to contain an area of 12,844.50 square feet. The proof offered was for the purpose of showing that the west boundary line of the compromise strip should be nine and one-half feet further west than the boundary as shown. This would make the compromise strip 39½ feet wide and make its area about 4,000 square feet in excess of the area which it is alleged the compromise ground contains. The effect of such proof would be to contradict the admission of the defendant in its answer. In no way could the west boundary line be moved nine and one-half feet to the west and still have the compromise ground thirty feet in width and contain an area of 12,844.50 square feet, unless the entire St. Louis claim is thrown over nine and one-half feet. The answer admits that the St. Louis claim is properly described, and, in fact, admits that it was located as it is described. If the compromise ground was not properly described, the description contained in the contract, judgment and deed could not be corrected in this action.

It is claimed for plaintiff in error that the words "all minerals therein contained," appearing in the judgment in the specific performance case and in the deed to the compromise ground, include and refer to the mineral in that part of the vein which has its apex within the boundaries of the St. Louis claim.

The mineral contained in a mining claim is the mineral which belongs to the claim. It not only includes the mineral beneath the surface boundaries, but also the mineral in all the veins having their apexes

within such surface boundaries, and extending in their downward course beyond the side lines. It is such mineral as the owner of the claim is authorized to extract therefrom. When a mining claim is conveyed, together with all minerals therein contained, such conveyance does not cover the mineral in a vein apexing in some other claim, because the minerals in such vein are not contained in the claim conveyed.

If we are to adopt the construction of this conveyance contended for by plaintiff in error, it would follow that the defendant in error is the owner of all that part of the Drumlummon vein the apex of which is in the St. Louis claim after it passes beyond the east bounding plane of the compromise ground. In other words, the conveyance was merely a conveyance of a slice, or section, of the vein on the dip.

Mr. Lindley in his work on Mines, second edition, volume 2, sections 616-618a, under the title, "Conveyances Affecting the Extralateral Right," learnedly discusses the subject of conveyances of mining claims with reference to the effect on the extralateral right. He cites and considers numerous authorities.

The effect of the conveyance of the compromise ground has been considered and determined by District Judge Knowles, District Judge Hunt and the circuit court of appeals for the ninth circuit. The five judges who have passed on the question, have all decided against the contention of plaintiff in error. Judge Hunt's views in regard to the matter appear in the record at page 57.

The defendant is clearly estopped from claiming that by the conveyance of the compromise ground it acquired the ore in controversy. In the specific performance case it is alleged that the purpose of the compromise agreement was to settle and agree upon the boundary

line between the Nine Hour claim and the St. Louis claim; that plaintiff in error was the owner of the compromise ground by virtue of its ownership of the Nine Hour claim. In brief, plaintiff in error proceeded in that case upon the theory that it always owned the compromise ground and was entitled to a conveyance of the legal title to that which it owned. Not having an assignment of the compromise agreement, it was necessary for it to establish this theory in order to recover a judgment. Now, instead of claiming that it received a title to that which was always a part of the Nine Hour claim and to property which it owned, it is contending that by the conveyance it not only acquired the legal title to that which it owned, but also acquired title to a vein which was owned by the St. Louis Company and constituted a part of the St. Louis claim. A party can not recover a judgment upon one theory, and, when his interests have changed, repudiate such theory and proceed upon a different basis.

Davis v. Wakalee, 156 U. S. 680.

The proof offered to show that the intention of the parties was different from the intention as alleged in the specific performance case, was properly rejected.

By the complaint in the specific performance case, and the pleadings in the present case, it is admitted that all of the area in conflict between the two claims, except the compromise ground, was a part of the St. Louis claim. It was not permissible, therefore, for the defendant to contradict its admissions by proof that the compromise ground does not contain all the ground which belonged to the Nine Hour claim.

By the compromise agreement the owners of the Nine Hour claim acquired that section of the Drumlummon vein lying south of the 133-foot plane and the apex of

which is within the compromise ground. An idea of the extent of such section can be obtained by reference to a copy of the map on page 144 of brief for plaintiff in error. The claim, therefore, that by the compromise the owners of the Nine Hour did not acquire any benefit or advantage unless the ore in controversy is held to belong to plaintiff in error is unfounded.

In conclusion we respectfully submit that when the pleadings, findings and judgment in the specific performance case, and the admissions of the defendant by its answer in the present case are fully considered, it will be found that all offers of proof were properly rejected, and that no error has been committed.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE UNITED STATES

October Term 1906

No. 402

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,

vs.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

PETITION FOR REHEARING.

and

PETITION TO MAKE OPINION MORE CERTAIN IN EVENT APPLICATION FOR REHEARING DENIED.

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Defendant in Error.

PETITION FOR REHEARING.

Now comes the defendant in error in the above entitled cause and respectfully petitions this court for a rehearing for the reasons:

I.

That the court has overlooked the fact that by the judgment in the specific performance case it was determined that the effect of the bond was to establish the

boundary line between the St. Louis and Nine Hour claims, and that such was the intention and agreement of the parties thereto; and that by such judgment it was also determined that the compromise ground is and always has been a part of the Nine Hour claim.

(a) The bond or contract to convey the compromise ground having been so construed upon issues presented in the action to obtain a specific performance thereof, and such construction having been essential to the judgment in such action, such judgment is evidence conclusive that the purpose of the bond was to establish the boundary line between the Nine Hour and St. Louis claims, and that the compromise ground is and always was a part of the Nine Hour claim, by reason of which the bond is not open to construction in this case.

(b) The judgment in the specific performance case having directed a conveyance of the property described in the bond, as construed in said case, the deed must be taken as conveying only that which Mayger by the bond agreed to convey, by reason of which the deed is not open to construction in this case.

II.

That the judgment in the specific performance case is absolutely controlling in the decision of the question considered by the court.

III.

That the court has inadvertently overlooked the fact that the plaintiff in error, by its answer, admits the allegations in paragraphs 1, 2 and 3 of the second amended and supplemental complaint.

Judgment in Specific Performance Case Determines Question Considered by the Court, and such Determination Conclusive Between Parties Hereto.

This court in its opinion says:

> "We pass, therefore, to a consideration of the merits, and the first question presented by counsel —indeed, as we look at it, the pivotal question—is the proper construction of the bond and deed by which the plaintiff in error claims title to the compromise ground."

This question is then considered, and it would seem that in the consideration of the question the court has completely overlooked the judgment in the specific performance case, to which attention is now called.

The following is quoted from the opinion:

> "Nothing can be invoked in the nature of an estoppel from the averments in the pleadings in the suit for specific performance. True, the plaintiff in error alleged that the compromise ground was a part of its mining claim, and that the bond was executed 'to settle and compromise the said suit and adverse claims, and for the purpose of settling and agreeing upon the boundary line between' the two claims; but the bond itself, reciting the fact of a settlement and compromise, and an agreement by the contestants to withdraw their objections to an application for a patent stipulates for a conveyance after patent, of the compromise ground, 'comprising a part of two certain quartz lode mining claims, known as the St. Louis lode claim and the Nine Hour lode claim,' they being, respectively, the two claims owned by the parties hereto. Further, the answer denied that the compromise ground was

a part of the Nine Hour claim, and alleged that the then owner of the St. Louis lode claim executed the bond as a compromise of the adverse claim and suit, and to enable him to obtain a patent for the whole of his claim."

In the replication in this case it is alleged by defendant in error in answer to the affirmative defense pleaded by plaintiff in error, that in the action for specific performance:

> "It was found and determined by the court, as a matter of fact, that the said thirty-foot strip or compromise ground was at all times a part of the said Nine Hour lode mining claim, and was by the parties to said agreement, agreed to be a part thereof, and that the said agreement with the said Charles Mayger, a copy of which is attached to the amended answer herein, was made and given for the purpose of settling and determining and fixing the boundary line between the Nine Hour lode mining claim and the St. Louis lode mining claim, the boundaries of which claims had been and were at the time of the execution of said agreement in conflict, and concerning which a controversy then existed between the parties to said agreement." (Rec. p. 14.)

The judgment roll in the specific performance case was introduced in evidence by defendant in error as a part of its case, without objection from plaintiff in error. (Rec., p. 41.)

MATTERS IN ISSUE IN SPECIFIC PERFORMANCE CASE AND DETERMINED BY JUDGMENT THEREIN.

In the complaint in the specific performance case it is

alleged that the predecessors in interest of the plaintiff were, prior to the 7th day of March, 1884, the date of the bond,

> "the owners of, in possession of, and lawfully entitled to the use, occupation and possession of all and singular that piece or parcel of mining ground comprising a portion of the Nine Hour lode mining claim."

Then follows a description of the compromise ground. It is further alleged that Mayger

> "had wrongfully extended, and caused to be extended, the easterly boundary line of his said mining claim over the premises so above mentioned and particularly described, which said premises were then, and ever since the 26th day of July, 1880, have been, a part of the Nine Hour lode mining claim, so that the property of the aforesaid predecessors in interest of this plaintiff, and of which said portion and of the whole of said mining claim they were then and there the owners, in the actual possession, and entitled to the possession thereof." (Rec., p. 42.)

In this connection it should be noticed that there is no claim or pretense in the complaint in the specific performance case that the area in conflict between the two claims was greater or more than the compromise ground.

It is also allged:

> "That thereupon, and on the 7th day of March, 1884, to settle and compromise the said suit, and the adverse claim, and for the purpose of settling and agreeing upon the boundary line between the said Nine Hour lode mining claim and the said St. Louis lode mining claim".

the bond was made, executed and delivered; that by the bond Mayger

> "covenanted and agreed that when he should obtain such patent, and on demand of the said William Robinson, James Huggins and Frank P. Sterling, or their heirs or assigns, he would make, execute and deliver to them, their heirs or assigns a good and sufficient deed of and for all the premises so above particularly mentioned and described." (Rec., pp. 42-43.)

The 4th paragraph of the complaint reads in part as follows:

> "And the plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described, has come to it and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said Nine Hour lode mining claim; that being so the owner of said mining claim, and being so entitled to a conveyance of the portion thereof above particularly mentioned and described, this plaintiff"

demanded a conveyance, etc. (Rec., p. 43.)

These several allegations were denied by the answer. (Rec., p. 46) In the replication it is denied by plaintiff in eror that the

> "premises particularly mentioned and described in the complaint herein are or ever were any part of the St. Louis mining claim in any other way or manner or at all, except that the same were by the agreement aforesaid to be embraced in the application of the said Charles Mayger for a patent as in

the complaint herein mentioned and set forth." (Rec., p. 49.)

It is denied that the

"boundary lines of the St. Louis mining claim as originally located included or embraced the *locus in quo* or any part or portion thereof." (Rec., p. 49.)

The court found as facts:

"That the strip of ground called the 'compromise ground,' which is the subject of dispute in this action, was, at that time, and thereafter continued to be a part of said Nine Hour lode mining claim.

"That said bond was made and given * * * for the purpose * * * of determining and fixing the boundary line between the said Nine Hour lode mining claim and the St. Louis lode mining claim.

"That at the date of the execution and delivery of said bond it was expressly agreed between the parties hereto that all of the ground lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour lode mining claim.

"That the conveyances introduced in evidence on the part of the plaintiff embrace and were intended to include the said compromise ground, * * * and it was the intention of the parties to the deeds to convey as well their interests in said compromise strip as every other part and parcel of the said Nine Hour lode mining claim." (Rec., pp. 50-52.)

In the judgment proper it is recited that:

"The court having made and filed on the 1st day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner of the equitable and en-

titled to the conveyance from the defendants of the legal title to the premises in the complaint and hereinafter described." * * *

JUDGMENT IN SPECIFIC PERFORMANCE CASE CONCLUSIVE BETWEEN PARTIES HERETO OF MATTERS DETERMINED BY SUCH JUDGMENT.

Although, as stated by the court, "nothing can be invoked in the nature of an estoppel from the averments in the pleadings in the suit for specific performance," we respectfully submit that the judgment in that case constitutes evidence conclusive upon the issues determined and the facts found which were essential to sustain such judgment.

Cromwell v. Sac County, 94 U. S. 351.
Southern P. R. Co. v. United States, 168 U. S. 47.
Fayerweather v. Ritch, 195 U. S. 276.

In the opinion in the case of Southern P. R. Co. v. United States, cited above, the court speaking through Mr. Justice Harlan, said:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, can not be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil

courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

In the case of Fayerweather v. Ritch, 195 U. S. 276, this court, speaking through Mr. Justice Brewer, said:

"We pass, therefore, to consider the merits of the case. Private rights and public welfare united in demanding that a question once adjudicated by a court of competent jurisdiction shall, except in direct proceedings to review, be considered as finally settled and conclusive upon the parties. *Interest rei publicae ut sit finis litium.* But in order to make this finality rightful it should appear that the question was distinctly put in issue; that the parties presented their evidence, or at least had an opportunity to present it, and that the question was decided."

The principles of law stated in the foregoing quotations have been recognized by this court by an unbroken line of authorities, commencing with Hopkins vs. Lee, 6 Wheaton, 109, to and including the case in 195 U. S., cited above.

BOND HAVING BEEN CONSTRUED IN SPECIFIC PERFORMANCE CASE, NOT OPEN TO CONSTRUCTION IN THIS CASE.

It was alleged in the complaint that the compromise ground constituted a part of the Nine Hour claim prior to the execution of the bond. The court so found.

It was alleged that the purpose of the parties to the bond was to fix and determine the boundary between the two claims, and that by the bond Mayger covenanted and agreed to convey the compromise ground, or that which was always a part of the Nine Hour claim. The court so found.

It was alleged that by the conveyance to the plaintiff in the case of the Nine Hour claim the compromise ground was conveyed, because it was a part of the Nine Hour claim. The court so found.

There is no allegation in the complaint that the plaintiff in the case obtained any assignment of the bond. The right of plaintiff in error to a conveyance was based upon its ownership of the Nine Hour claim and the fact that the compromise ground was a part of such claim.

It was necessary, therefore, for the plaintiff to allege and prove that the compromise ground was always a part of the Nine Hour claim, that the purpose of the agreement was to fix and determine the boundary between the claims, and that by the bond Mayger covenanted and agreed to convey that which was a part of the Nine Hour claim. If the compromise ground embraced any part of the St. Louis claim, as the plaintiff had not received any assignment of the bond or any conveyance of the compromise ground, except as the same was embraced in the conveyance of the Nine Hour claim, the plaintiff would necessarily have failed in its suit.

In this connection attention is called to the opinion of the circuit court of appeals in the case (102 Fed. 430), in which it is stated:

> "When the suit was brought for the specific performance of the compromise contract, it was brought by the successors in interest of those who had represented the Nine Hour claim at the time of the compromise. The plaintiffs therein were not the assignees of the contract. They maintained the suit solely as owners of the Nine Hour claim, and upon the theory that the strip of land so contracted to be conveyed was a portion of the Nine Hour claim."

This court in the opinion in this case says:

> "It is undoubtedly true that if the bond had simply described the surface area or fixed the boundary line between the two claims the subsurface and extralateral rights might have been determined by the mining law."

As a matter of fact the bond as construed in the specific performance case upon issues duly presented did fix the boundary line between the two claims. The judgment in the specific performance case being conclusive between the parties hereto the bond is not now open to construction.

The court found in the specific performance case that "the plaintiff is the owner of the equitable, and entitled to a conveyance by the defendants of the legal title" to the compromise ground. (Rec., p. 53.) The plaintiff had obtained a conveyance of the Nine Hour claim, and by such conveyance had acquired the equitable title to the compromise ground, because the compromise ground was a part of such claim. It was not claimed, and the court did not find, that by such conveyance the plaintiff had acquired any part of the St. Louis claim. It follows that the plaintiff, when it commenced the action for

specific performance, was the owner of that only which belonged to and was a part of the Nine Hour claim, and was not the owner of the ore in controversy, because such ore is in a vein apexing in the St. Louis claim, which was not a part of the Nine Hour claim.

The opinion of this court in the specific performance case (171 U. S. 679) shows that this court treated the judgment as requiring a conveyance of a part of the Nine Hour claim. In the opinion of this court just referred to it is said:

> "The proposition of plaintiffs in error is that where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is the duty of the latter to file an adverse claim and thereafter bring in some court of competent jurisdiction an action to determine the right to the area in conflict, which action must be prosecuted to a final judgment or dismissed; and that no valid settlement can be made by which such adverse claimant can acquire any interest in the ground when thereafter patented by the applicant. We are not aware of any public policy of the government which sustains this proposition."

After the plaintiff had alleged the intention of the parties to the bond and placed its construction upon the bond in the specific performance case, in order that it might compel a conveyance of the compromise ground, the intention of the parties and the construction of such bond should be treated as forever foreclosed.

Winona & St. P. L. Co. v. Minnesota, 159 U. S. 524.

In the case just cited it was contended that a certain contract was open to construction and did not pass an

equitable title. It appeared that in previous litigation a decree had been entered requiring the specific performance of such contract. This court refers to the former decree and, speaking through Mr. Justice Brewer, says:

> "It is, therefore, unnecessary to enter into any elaborate discussion of the terms and stipulations of the contract, or to seek to determine what are or are not dependent covenants. It is enough to rest upon the fact that by a conclusive decree of a competent court it is established that the full equitable title had passed to the plaintiff in error prior to the time at which the lands were adjudged taxable."

The plaintiff in error having alleged in the specific performance case that the purpose of the bond was to establish the boundary between the two claims and that the compromise ground is and always was a part of the Nine Hour claim, and the court having so found, and the judgment having so determined, the plaintiff in error should not be permitted now to change its position.

Davis v. Wakalee, 156 U. S. 680.
Ohio, etc. R. Co. v. McCarthy, 96 U. S. 267.

DEED ONLY CONVEYED PROPERTY WHICH MAYGER BY THE BOND, AS CONSTRUED IN SPECIFIC PERFORMANCE CASE, AGREED TO CONVEY.

The deed was not a voluntary deed, and must be treated as conveying only that which the judgment directed to be conveyed. When the judgment is construed in the light of the pleadings and findings, as it should

be (Hornbuckle v. Stafford, 111 U. S. 380), the expression "all mineral therein contained" can not refer to any mineral except such as belonged to and was a part of the Nine Hour claim. The fact that the deed which the court approved contains the clause, "together with all the mineral therein contained," and also the language, "together with all dips, spurs, angles," etc., instead of evidencing an intention on the part of the court to direct a conveyance which should have the effect of a common law conveyance, shows conclusively that the court intended the conveyance to carry the mineral rights attaching to the Nine Hour claim. The court had found that the purpose of the bond was to determine the boundary line, and that the compromise ground was and always had been a part of the Nine Hour claim. In the light of these findings the plaintiff in error was entitled to the extralateral rights attaching to the compromise ground, and when the court directed that the conveyance should include the "dips, spurs, angles," etc., it intended the conveyance to conform to its findings and judgment. In other words, the court having found and determined that the plaintiff was entitled to a conveyance of the compromise ground as a part of the Nine Hour claim, used the language, "together with all dips, spurs, angles," etc., so that there would be no room for the contention that the expression, "together with all mineral therein contained," covered and embraced only the mineral beneath the surface.

This court in its opinion, in referring to the language of the deed, says:

> "Further, while it may be true that the words 'together with all the dips, spurs and angles,' etc.,

> are generally employed in conveyances of mining claims in order to emphasize the fact that not merely the surface but the extralateral rights which go with a mining claim are conveyed, yet it must be noticed that in addition to these customary words are these, found in both the bond and the deed, 'together with all the mineral therein contained,' and they can not be ignored, but must be given a meaning reasonable and consistent with other parts of the instruments. It is not satisfactory to say that they are only equivalent to those that follow, 'dips, spurs,' etc., that the same thing is meant by each expression. While of course repetition is possible, yet it is not to be expected; and when, in addition to the ordinary words found in conveyances of mining claims, is this extra clause, we naturally regard it as making some further grant."

The language contained in the deed, viz: "together with all dips, spurs, angles," etc., is not contained in the bond. The bond merely described boundaries of the compromise ground and provides for a conveyance thereof, "together with all mineral therein contained."

If the judgment is construed to require a conveyance of more or other property than that described in the bond, the judgment would be void to the extent of such excess or other property. Suppose a contract should provide for the conveyance of one acre, and an action should be brought for the specific performance of such contract, and the judgment should require a conveyance of the one acre and ten additional acres. To the extent of the additional acres the judgment would necessarily be void because not supported by the pleadings. So in this case the judgment must be construed in the light of the pleadings, and as the complaint demanded a specific performance of the bond, the judg-

ment can not be treated as requiring a conveyance of any property not described in the bond.

It follows that the language of the deed, "together with all dips, spurs, angles',, etc., unless treated as having the same meaning as the expression, "together with all mineral therein contained," must be treated as surplusage.

It having been alleged, and the court having found and determined in the specific performance case, that the purpose of the bond was to establish the boundary line between the two claims, that the compromise ground is and always was a part of the Nine Hour claim, and that plaintiff in error, by virtue of the conveyance to it of the Nine Hour claim, obtained the equitable title to the compromise ground, the deed must be taken as conveying only the property covered by the bond as construed in the said specific performance case, or that which was always a part of the Nine Hour claim. A patent from the United States, whatever its language, conveys only that which the law authorizes to be conveyed. So the deed here can not convey more than the bond as construed, agreed to convey.

The circuit court of appeals in its opinion (102 Fed. 430), in construing the deed to the compromise ground, considered the pleadings and decree in the specific performance case, and the theory upon which that suit was maintained. It is fair to suppose that District Judges Knowles and Hunt, who also passed on the question, considered the same matters.

Admission Made by Plaintiff in Error in the Pleadings in This Case.

In the second paragraph of the second amended and supplemental complaint the St. Louis claim is described as embracing within its boundaries certain surface area, "save and except that portion thereof known as the thirty-foot strip or compromise ground which belongs to and is a part and portion of what is known and designated as the Nine Hour lode mining claim." Then follows a specific description of the boundaries of the compromise ground, with the added clause, "together with all mineral therein contained." (Rec., pp. 2 and 3.) In the third paragraph it is alleged that the Nine Hour claim, "including the thirty-foot strip or compromise ground aforesaid," was located subsequent to the location of the "said St. Louis claim." (Rec., p. 3.)

The first paragraph of the answer reads as follows:

> "It admits the allegations contained in paragraphs 1, 2 and 3 of the said second amended and supplemental complaint." (Rec., p. 7.)

As it is admitted that the compromise ground belongs to and is a part of the Nine Hour claim, and that the Nine Hour claim, including the compromise ground, was located subsequent to the location of the St. Louis claim, it necessarily follows that the Nine Hour claim when located embraced the compromise ground, and that the compromise ground was never a part of the St. Louis claim.

This court in its opinion calls attention to the recital or statement in the bond that the compromise ground comprises "a part of two certain quartz lode

mining claims, known as the St. Louis lode claim and the Nine Hour lode claim." We submit that this recital or statement should not be accepted as against the admission of plaintiff in error now made by its answer in this case. It is elementary law that parties are bound by admissions made in the pleadings in a case. The plaintiff in error could not have introduced in evidence the bond for the purpose of disproving its admission that the compromise ground is and always was a part of the Nine Hour claim, and for this reason the court should not have taken the recital or statement in the bond as against the admission in the pleadings in this case.

Now, if the compromise ground is a part of the Nine Hour claim, and was a part of such claim when located, and was never a part of the St. Louis claim, what was conveyed by the conveyance of the compromise ground, "together with all mineral therein contained?" Bearing in mind that the compromise ground is a part of the Nine Hour claim, and was a part of such claim when located, or otherwise the Nine Hour claim, including the compromise ground, could not have been located subsequent to the location of the St. Louis claim, the conclusion is irresistible that the conveyance of the compromise ground conveyed only that which was a part of the Nine Hour claim, as located, and the expresssion, "all mineral therein contained," refers to the mineral which was a part of the Nine Hour claim, and not to the mineral which was a part of the St. Louis claim. The compromise ground is described as not only embracing the surface area, but as also embracing "all mineral therein contained." It is the compromise ground, as thus described, that is admitted to be and always to have been a part of the Nine Hour claim. The conveyance, there-

fore, could not convey anything more than that which belonged to and was a part of the Nine Hour claim when located. By the location of the Nine Hour claim the locators did not acquire any right to any of the ore in controversy, and when a conveyance was made of that which belonged to and was a part of the Nine Hour claim, such conveyance could not convey the said ore.

Furthermore, it is alleged in the second paragraph of the second amended and supplemental complaint, and admitted by the answer, that the defendant in error "is the owner of, entitled to, and in the actual possession and occupation of that certain quartz lode mining claim known as the St. Louis lode mining claim, and of the quartz, rock and other precious ore contained in all veins, lodes and ledges of mineral bearing rock through their entire depth, the tops or apexes of which lie within the surface lines" of the said St. Louis claim as described. (Rec., p. 2.)

We therefore submit and earnestly insist that if the court had not overlooked the judgment in the specific performance case and what is expressly admitted by the pleadings in this case, to which attention has been directed, the decision of the questions considered would have been different.

* * * * * *

As we understand the opinion of the court, it is held that the conveyance of a portion of a mining claim, "together with all mineral therein contained," may or may not pass title to the mineral underneath the surface, depending upon the intent of the parties. This holding is so far reaching in its consequences, in that it will disturb the titles to so much mining property in this western country, and the question is of such public

interest, that we respectfully submit further consideration of the question should be had before the decision becomes absolutely final.

The late Senator Brown, one of the attorneys for defendant in error, appreciating the importance of the questions involved in this case, had thoroughly prepared to present such questions as they should be presented. Owing to an unfortunate tragedy, Senator Brown was not able to be present at the argument, and Mr. M. S. Gunn, who presented the case, not having intended to argue the merits, was poorly equipped for the argument. It was probably due to this condition of affairs that the attention of the court was not directed to the facts which it now appears were overlooked, and which seem to us to be controlling in the case.

Under the circumstances, we respectfully submit that in justice to defendant in error, and in justice to the mining interest of the west, a rehearing should be granted.

Respectfully submitted.

T. C. BACH,
J. H. RALSTON,
M. S. GUNN,
Attorneys for Defendant in Error.

J. B. CLAYBERG,
F. L. SIDDONS,
IRA T. WIGHT,
W. E. RICHARDSON,
Of Counsel.

I, M. S. Gunn, one of the attorneys for the defendant in error, do hereby certify that the foregoing petition for a rehearing is well founded, and that the same is not interposed for delay.

M. S. GUNN.

(For petition to make opinion more certain, see following page.)

PETITION TO HAVE OPINION MADE MORE CERTAIN.

If the application for the rehearing should be denied your petitioner respectfully requests the court to state with greater certainty in the opinion the holding and decision of this court in said case.

The opinion as understood by petitioner and its attorneys decides that the deed to the compromise ground "together with all mineral therein contained" may or may not have conveyed the ore beneath the surface of the compromise ground and contained in the section of the Drum Lummon vein having its apex within the surface boundaries of the St. Louis claim, depending upon the intent of the parties as disclosed by evidence of such intent.

As the subject matter of the conveyance is mining property does the presumption obtain that the conveyance was intended to convey only the subsurface rights attaching to the compromise ground, or is it to be presumed that the parties intended that the deed should have the effect of a conveyance at common law? In other words upon whom rests the burden of proof as to the intent of the parties?

We submit that as a new trial will be had the holding and decision of the court should be stated with such

certainty that no controversy can arise regarding the matter.

Respectfully submitted,

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Supreme Court of the United States.

No. 402.—October Term, 1906.

The Montana Mining Company, Limited, Plaintiff in Error, *vs.* The St. Louis Mining and Milling Company of Montana.	In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[January 14, 1907.]

The litigation between these parties has been protracted through a series of years. A brief history will help to an understanding of the present questions. Prior to [illegible]les Mayger had located the St. Louis lode claim in Lewis an[illegible] County, Montana Territory, and William Robinson and others [illegible]cated, adjoining thereto, the Nine Hour lode claim. These claims conflicted. Mayger made application for a patent. Thereupon adverse proceedings were commenced by Robinson and his associates against Mayger in the District Court of the Third Judicial District of Montana. For the purpose of settling and compromising that action on March 7, 1884, a bond was executed by Mayger to the other parties, in which he agreed to proceed as rapidly as possible to obtain a patent, and then to execute and deliver to Robinson a good and sufficient deed of conveyance of a tract described as "comprising a part of two certain quartz lode mining claims, known as the St. Louis lode claim and the Nine Hour lode claim, and particularly described as follows, to wit." Then follows a description of what is known as the compromise ground, a tract including an area of 12,844.5 square feet, "together with all the mineral therein contained." Mayger proceeded to obtain a patent for the St. Louis claim, including the compromise ground, as did also Robinson and his associates, a patent to the Nine Hour claim, omitting the compromise ground. Thereafter the plaintiff in error acquired the interest of Robinson and his associates and the defendant in error the interest of Mayger. The former company demanded a conveyance of the compromise ground in accordance with the terms of the bond executed by Mayger, which, being refused, suit was brought in a District Court of the State, which rendered a decree in its favor. That decree having been affirmed by the Supreme Court of the State, the St. Louis company brought the case to this court, and on October 31, 1898, the judgment of the Supreme Court of Montana was affirmed. 171 U. S. 650. In pursuance of the decree the St. Louis

company deeded the tract described in the bond, giving its boundaries, the number of square feet contained therein, and adding, "together with all the mineral therein contained. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver-bearing quartz-rock and earth therein, and all the rights, privileges and franchises thereto incident, appended or appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances."

Prior explorations, the exact date of which is not shown, but apparently long after the compromise agreement, had disclosed the fact that beneath the surface of this compromise ground there was a large body of ore which, it was claimed, belonged to a vein apexing in the territory of the St. Louis claim. This was not the discovery vein, but a secondary vein, frequently called the Drumlummon vein or lode, whose apex was between the compromise ground and the apex of the St. Louis discovery vein. Some of this ore was mined and removed by the Montana company. On September 16, 1893, a year before the specific performance suit was brought, the St. Louis company filed its complaint in the Circuit Court of the United States for the District of Montana, against the Montana company and several individual defendants, claiming to recover $200,000 for the damages sustained by the trespass of the defendants in removing the ore. In its complaint the St. Louis company alleged that it was a corporation organized under the laws of Montana, and that the Montana company was a corporation incorporated under the laws of the Kingdom of Great Britain, but nothing was said as to the residence or citizenship of the individual defendants.

On November 21, 1898, three weeks after the decision by this court in the specific performance suit, an amended and supplemental complaint was filed, which omitted the individual defendants and sought a recovery from the Montana company alone for the ore so wrongfully removed, as alleged. On June 26, 1899, a second amended and supplemental complaint was filed, also against the Montana company alone, and asking for the same relief. To this an answer was filed, setting up the bond and deed heretofore referred to, and pleading that thereby the plaintiff was estopped from claiming any part of the compromise ground or any mineral contained therein.

Pending this litigation, and on respectively the sixth and twelfth days of December, 1898, orders were issued by the Circuit Court restraining

severally each of the parties to this litigation from taking any more mineral from the disputed ground. On the second amended and supplemental complaint a trial was had in which judgment was rendered in favor of the St. Louis company for $23,209. To review this judgment, the Montana company prosecuted a writ of error from the Circuit Court of Appeals of the Ninth Circuit which writ was dated October 7, 1899, and the judgment was affirmed May 14, 1900. 102 Fed. Rep. 430; 42 C. C. A. 415. The St. Louis company took out a cross writ of error from the Circuit Court of Appeals dated January 30, 1900, and that court reversed the judgment October 8, 1900, and remanded the case for a new trial as to the recovery sought for the conversion and value of certain ores, which had been excluded by the Circuit Court from the consideration of the jury. 104 Fed. Rep. 664; 44 C. C. A. 120. The parties then brought, by separate writs of error, these two decisions of the Court of Appeals to this court, on consideration whereof this court held that the judgment in the Circuit Court was entirely set aside by the second decision of the Court of Appeals, and therefore dismissed both cases on the ground that there was no final judgment. 186 U. S. 24.

Whereupon the Court of Appeals sent down to the Circuit Court a mandate setting aside the judgment *in toto*, and ordering a new trial. This new trial was held on May 31, 1905, and resulted in a judgment in favor of the St. Louis company for $195,000, which judgment was affirmed by the Circuit Court of Appeals, to reverse which decision the Montana company sued out this writ of error.

After this last decision by the Court of Appeals the Circuit Court on the application of the St. Louis company set aside the order which restrained it from extracting ore from the disputed territory. Thereupon the Montana company filed its application in this court for a reinstatement of that order and that it be continued in force until the final termination of the litigation.

The St. Louis company filed a motion to dismiss the writ of error sued out by the Montana company on the ground that the jurisdiction of the Circuit Court depended entirely on diverse citizenship, and therefore the decision of the Court of Appeals was final. The Montana company then made application for a writ of certiorari, which application was passed for consideration to the final hearing of the case.

Mr. Justice BREWER delivered the opinion of the Court.

The first question is, of course, the one of jurisdiction. If the jurisdiction of the Circuit Court depended alone on diverse citizenship then, undoubtedly, the decision of the Court of Appeals was final, and the case could only be brought here on certiorari. On the other hand, if it did not

depend alone on diverse citizenship, the decision of the Court of Appeals was not final, and the case is properly here on writ of error. The original complaint alleged the citizenship of the two corporations, plaintiff and defendant, but did not allege the citizenship of the individual defendants. In order to sustain the jurisdiction of the Circuit Court on the ground of diverse citizenship the citizenship of all the parties on one side must be diverse from that of those on the other. So, unless there was a Federal question presented by that complaint, as the citizenship of the individual defendants was not shown, the Circuit Court had no jurisdiction of the case. It may be that this was remedied by the subsequent first and second amended complaints, in which the individual defendants were left out, the citizenship of the two corporations, plaintiff and defendant, alleged, and to which complaints the Montana company, without raising any question of jurisdiction, appeared and answered. *Conolly* v. *Taylor*, 2 Pet. 556; *Anderson* v. *Watt*, 138 U. S. 694. Be that as it may, in view of the fact that this litigation has been twice before this court, has been protracted for many years, involves so large an amount, and also presents questions of Federal mining law, which, though perhaps not necessary for our decision, have yet been elaborately argued by counsel, we are of opinion that if the jurisdiction of the Circuit Court did, after the filing of the amended complaints, depend entirely on diverse citizenship, the case ought to be brought here by writ of certiorari. As either by writ of error or certiorari the decision of the Court of Appeals can be brought before this court, and as each has been applied for, and as the importance of the case seems to demand our examination, it is scarcely necessary to consume time in attempting to decide positively whether there was a Federal question involved, or the jurisdiction depended solely on diverse citizenship. The writ of error was duly allowed prior to the filing of the record in the first instance, and to avoid any further question of our jurisdiction we allow the certiorari. *Pullman Car Co.* v. *Transportation Co.*, 171 U. S. 138.

We pass, therefore, to a consideration of the merits, and the first question presented by counsel—indeed, as we look at it, the pivotal question—is the proper construction of the bond and deed by which the plaintiff in error claims title to the compromise ground.

The bond described the ground, adding, "together with all the mineral therein contained." The deed executed in pursuance of the judicial decree contains the same description, followed by the words above quoted and also the further words given in the statement of facts, "together with all the dips, spurs and angles," etc.

Now, the contention of the defendant in error is that the effect of the compromise followed by the bond and conveyance was simply to locate the boundary line between the two claims, leaving all subsurface rights to

be determined by the ordinary rules recognized in the mining districts and enforced by the statutes of Congress.

The argument in favor of this construction is forcibly put by Circuit Judge Gilbert, delivering the opinion of the Court of Appeals, when the case was first presented to that court. 102 Fed. Rep. 430; 42 C. C. A. 415. Without quoting it in full it is to the effect that agreements and conveyances of the whole or parts of mining claims are to be construed in the light of the mining law, as, generally speaking, we construe a contract, not merely by its terms, but having regard to the subject matter involved and the surrounding circumstances, in order to ascertain the intention of the parties. Particular reference was made to *Richmond Mining Co.* v. *Eureka Mining Co.*, 103 U. S. 846, in which this court held that a line specified in a contract between the owners of contiguous mining claims to be one "continued downward to the center of the earth was not a vertical plane, but must be construed as extending the boundary line downward through the dips of the veins or lodes wherever they might go in their course toward the center of the earth."

Further, the argument is that the adverse proceedings were maintained by the owners of the Nine Hour claim on the theory that the strip of land so contracted to be conveyed was a portion of that claim; that if the action had gone to judgment, sustaining their contention, the result would have been simply to fix the surface line of division between the two claims, without affecting the subsurface rights. Reference was also made to the suit for specific performance brought by the present plaintiff in error, in which it alleged that the contract had been made for the purpose of settling and agreeing upon the boundary line between the two claims, and that the suit was maintained upon the theory that, as owner of the Nine Hour claim, it owned the compromise ground afterwards conveyed.

We are not insensible to the force of this argument, and also appreciate fully what is said by counsel in reference to the familiarity of the several concurring Justices with mining law and contracts and conveyances made under it.

Yet, notwithstanding, we are compelled to dissent from their construction of these instruments, and to hold that something more was intended and accomplished than the mere establishment of a surface boundary line. We premise by saying that nothing can be invoked in the nature of an estoppel from the averments in the pleadings in the suit for specific performance. True, the plaintiff in error alleged that the compromise ground was a part of its mining claim, and that the bond was executed "to settle and compromise the said suit and adverse claims, and for the purpose of settling and agreeing upon the boundary line between" the two claims; but the bond itself, reciting the fact of a settlement and compromise, and

an agreement by the contestants to withdraw their objections to the application for a patent, stipulates for a conveyance, after patent, of the compromise ground, "comprising a part of two certain quartz lode mining claims, known as the St. Louis lode claim and the Nine Hour lode claim," they being, respectively, the two claims owned by the parties hereto. Further, the answer denied that the compromise ground was a part of the Nine Hour lode claim, and alleged that the then owner of the St. Louis lode claim executed the bond as a compromise of the adverse claim and suit, and to enable him to obtain a patent for the whole of his claim.

The facts in the case, as well as the allegations in these pleadings, show that the two claims conflicted, that when application was made for a patent adverse proceedings were instituted, and that rather than try the title of the respective locators to the territory in conflict, and by way of compromise, they agreed that the owner of the St. Louis claim might proceed to patent, and then convey the compromise ground to the grantors of the plaintiff in error.

It must also be noticed that the dispute between the two claims was not simply in respect to the compromise ground—at least, testimony offered to prove this was ruled out—but involved a larger area, and that the disputing parties settled by the bond, describing what was to be conveyed.

It is undoubtedly true that if the bond had simply described the surface area or fixed a boundary line between the two claims, the subsurface and extralateral rights might have been determined by the mining law. It might have been implied that there was no intention to disturb the rights given by it.

Further, while it may be true that the words "together with all the dips, spurs and angles," etc., are generally employed in conveyances of mining claims in order to emphasize the fact that not merely the surface but the extralateral rights which go with a mining claim are conveyed, yet it must be noticed that in addition to these customary words are these, found in both the bond and the deed, "together with all the mineral therein contained," and they can not be ignored, but must be given a meaning reasonable and consistent with other parts of the instruments. It is not satisfactory to say that they are only equivalent to those that follow, "dips, spurs," etc., that the same thing is meant by each expression. While of course repetition is possible, yet it is not to be expected; and when, in addition to the ordinary words found in conveyances of mining claims, is this extra clause, we naturally regard it as making some further grant.

The scope of this deed would not be open to doubt if only the common law was to be considered. And in this connection it may be remarked that the common law has been kept steadily in force in Montana. "The common law of England, so far as the same is applicable and of a

general nature, and not in conflict with special enactments of this Territory, shall be the law and the rule of decision, and shall be considered as of full force until repealed by legislative authority." Laws of Montana 1871, 1872, p. 388, ch. 13, sec. 1, substantially re-enacted in Mont. Ann. Code, sec. 5152. See also *Territory* v. *Ye Wan*, 2 Mont. 478, 479; *Territory ex rel.* v. *Virginia Road Co.*, Ibid. 96; *Butte Hardware Co.* v. *Sullivan*, 7 Mont. 312; *Palmer* v. *McMasters*, 8 Mont. 186, 192; *Milburn Mfg. Co.* v. *Johnson*, 9 Mont. 541; *Forrester* v. *B. & Min. Co.*, 21 Mont. 544, 556. By that law a deed of real estate conveys all beneath the surface, unless there be some words of exception or limitation. But the mining laws of both State and Territory were in force, and in construing conveyances of mining claims the provisions of those laws must be taken into account, and may add to or subtract from the rights passing by a common law conveyance of agricultural or timber lands. It is probably not necessary to specify extralateral rights in order that a conveyance of a mining claim be operative to transfer them, and yet it is not strange that the custom grew up of naming them for the sake of avoiding the possibility of disputes. While the bond made no mention of extralateral rights, yet in all probability it would have been held to pass them and the court may have thought that the single specification, "all the mineral therein contained," was liable to be construed as narrowing the conveyance so as to include only the mineral beneath the surface, and therefore required that there should be incorporated in the deed the words "together with all the dips, spurs," etc. Yet in requiring the introduction of these words, which in terms define extralateral rights, it also retained the phrase "together with all the mineral therein contained."

To the suggestion that giving this construction to the bond and conveyance is in effect the granting of a section of a vein of mineral, the answer is that there is nothing impractical or unnatural in such a conveyance. It does not operate to transfer the vein *in toto*, but simply carves out from the vein the section between the vertical side lines of the ground and transfers that to the grantee. The title to the balance of the vein remains undisturbed.

To the further suggestion that the owner of the apex might be left with a body of ore on the descending vein beyond the further side line of the compromise ground which he could not reach, the answer is that this assumes as a fact that which may not be a fact. The owner of the apex may be the owner of other ground by which access can be obtained to the descending vein, and it also is a question worthy of consideration whether granting a section out from a descending vein does not imply a right reserved in the grantor to pass through the territory of the section conveyed in order to reach the further portion of the vein. Those are questions which need not now be

determined. This secondary vein does not appear to have been known at the time of the compromise, and while, of course, there is always a possibility of such a vein being discovered, yet parties are more apt to contract and settle upon the basis of what they know than upon the possibilities of future discovery.

The action of the parties hereto is suggestive, although not of itself decisive. This action for the recovery of ore taken out from beneath the surface of the compromise ground was pending when the suit for specific performance was brought in 1894. Nothing was done in this action from that time until three weeks after a final decision of the specific performance case by this court, when an amended complaint was filed, and the case thereafter proceeded by ordinary stages to trial and judgment. The original complaint alleged the ownership by the St. Louis company of its mining claim and of all veins, lodes or ledges having their tops or apexes inside of its surface boundary lines, with the right to follow those veins, lodes or ledges on the dips or angles outside the side lines of the mining claim. It also alleged that the defendants entered wrongfully upon one of the veins, lodes or ledges having its top or apex within the surface location of the St. Louis claim, and which had in its dip or angle passed outside the side lines of the St. Louis claim and "entered beneath the mining property claimed or pretended to be claimed by the said defendants or some of them, and that in utter disregard of the right or title of plaintiff the said defendants ever since have been and now are extracting and taking therefrom large quantities of coarse rock and ore," etc. In other words, it sought to recover from the Montana company the value of the ore taken by the latter from a vein whose apex was within the surface boundaries of the former's claim, but which in its dip had passed outside the side lines into territory claimed by the Montana company. With that as its claim the litigation was dormant for four years. Now, if it were true that the apex of the vein was within the side lines of the St. Louis claim and the ore taken by the defendant was taken from below the surface of the compromise ground, and all that was accomplished by the compromise and bond was the establishment of a boundary line, leaving subsurface and extralateral rights undisturbed, there was no necessity of postponing the litigation until the question of title to the surface was disposed of. As we have said, we do not mean that this is decisive, because the St. Louis company may have thought that all controversies would be ended if it could once establish that the Montana company took nothing by virtue of the compromise and bond. Still the delay in the litigation is in harmony with the belief that the words in the bond, "together with all the mineral therein contained," meant all the mineral below the surface.

The disposition of this question compels a reversal of the judgment. It may also effectually dispose of all disputes between the parties, and, therefore, it would be a mere waste of time to attempt to consider other questions which have been discussed with ability and elaboration by counsel.

In view of this conclusion it is also apparent that the order restraining defendant in error from removing ore from the disputed territory ought not to have been set aside.

The judgment of the Court of Appeals is reversed and the case remanded to the Circuit Court with instructions to grant a new trial. Further, the order restraining defendant in error from mining and removing any of the ore in dispute will be reinstated and continued in force until the final disposition of the case.

True copy.

Test:

Clerk Supreme Court, U. S.